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EDITOR'S NOTE

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o. 83-1032-ATH
tatus: GRANTED

Title: Federal Election Commission, Appellant
v.
National Conservative Political Action Committee, et al.

ocketed:
ecember 22, 1983

Courts: United States District Court for the Eastern District of Pennsylvania

ice:
83-1122

Counsel for appellant: Steele, Charles N., Fairson, Steven B.

Counsel for appellee: Solicitor General, Spaeth Jr., Robert B.

ntry	Date	Note	Proceedings and [illegible]
1	Dec 22 1983	1	Statement as to jurisdiction filed.
2	Dec 22 1983		Appendix of appellant FEC filed.
3	Jan 24 1984		Waiver of right of appellee Natl. Conservative Political to respond filed.
4	Feb 3 1984		DISTRIBUTED. February 24, 1984
5	Feb 22 1984	P	Response requested. (Due March 23, 1984 - NONE RECEIVED)
7	Mar 15 1984		Brief amicus curiae of Common Cause filed. VIDED.
8	Mar 23 1984		Motion of appellees Natl. Conservative Political Action Committee, et al. to dismiss or affirm filed. VIDED.
9	Mar 23 1984		Brief amicus curiae of National Congressional Club filed. VIDED.
10	Mar 24 1984	2	Motion of Gulf & Great Plains Legal Foundation, et al. for leave to file a brief as amici curiae filed.
11	Mar 28 1984		REDISTRIBUTED. April 13, 1984
13	Apr 3 1984	R	Reply brief of appellant FEC filed.
14	Apr 16 1984		Motion of Gulf & Great Plains Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
15	Apr 16 1984		PROBABLE JURISDICTION NOTED. The case is consolidated with 83-1122, and a total of one hour is allotted for oral argument.
16	Apr 18 1984	3	Notice of appellants in No. 83-1122 to expedite briefing and oral argument filed.
17	Apr 20 1984		Response of Federal Election Commission to motion of appellants in No. 83-1122 to expedite filed.
18	Apr 23 1984		Opposition of appellees to motion of appellants in No. 83-1122 to expedite briefing and oral argument filed.
19	Apr 23 1984		DISTRIBUTED. April 27, 1984. (ABOVE MOTION).
20	Apr 24 1984		Application for leave to file brief as amicus curiae in excess of page limits filed by Common Cause.
21	Apr 24 1984		Filed with Justice Brennan (A-857). Granted on 4/25/84 not to exceed 50 pages.
22	Apr 30 1984		Motion of appellants in No. 83-1122 to expedite briefing and oral argument DENIED.
24	May 29 1984		Order extending time to file brief of appellant on the merits until July 2, 1984.
26	May 29 1984		Order extending time to file brief of appellee on the merits until August 31, 1984.
27	Jun 29 1984		Lodgings received.
28	Jun 29 1984		Brief amicus curiae of Common Cause filed. VIDED.

No. 83-1032-ATH

Entry	Date	Note	Proceedings and Orders
29	Jul 2 1984		Brief of appellants Democratic Party of the U.S.,et al. filed. VIDED.
30	Jul 2 1984		Brief of appellant Federal Election Commission filed. VIDED.
31	Jul 2 1984		Joint appendix filed. VIDED.
32	Jul 26 1984		Certified original record (1 box) received.
33	Jul 26 1984		Application of National Congressional Club for leave to file amicus curiae brief in excess of the page limits
34	Jul 26 1984		and order granting same not to exceed 50 pages by Justice Brennan on July 27, 1984. (A-52)
35	Aug 31 1984		Brief of appellee Natl. Conservative Political Action Comm. filed. VIDED.
36	Aug 31 1984		Brief amicus curiae of American Civil Liberties Union filed. VIDED.
37	Aug 31 1984		Brief amicus curiae of Natl. Congressional Club filed. VIDED.
38	Aug 31 1984		Brief amicus curiae of Gulf & Great Plains Legal Fdtn., et al. filed. VIDED.
39	Oct 11 1984		CIRCULATED.
40	Oct 22 1984		SET FOR ARGUMENT. Wednesday, November 28, 1984. This case is consolidated with No. 83-1122. (3rd case) (1 hour).
41	Oct 25 1984		Application for leave to file reply brief of FEC in excess of the page limits filed with Brennan, J. (A-333)
42	Oct 26 1984		Order granting brief not to exceed 30 pages.
43	Nov 5 1984		Motion of Democratic National Committee for divided argument filed.
44	Nov 13 1984		Motion of Democratic National Committee for divided argument GRANTED. to be divided as follows: Federal Election Commission 20 minutes and Democratic National Committee 10 minutes.
45	Oct 25 1984	X	Reply brief of appellant FEC filed. VIDED.
46	Nov 23 1984	X	Reply brief of appellant Democratic Party of the U.S. filed.
47	Nov 28 1984		ARGUED.

JURISDICTIONAL

STATEMENT

83-1032

No. 83-

FILED
DEC 22 1983

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

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DECEMBER 22, 1983

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Congress intended 26 U.S.C. § 9011 (b) to confer on all voters a right to sue other private parties for construction and enforcement of the provisions of the Presidential Election Campaign Fund Act, in a three-judge district court with expedited direct appeal to this Court.

2. Whether the First Amendment to the Constitution of the United States precludes Congress from determining that it is necessary to limit the amount of money that political committees may spend on qualified campaign expenses to further the election of publicly financed presidential candidates, in order to ensure the effectiveness of public financing as an alternative means of financing presidential election campaigns.*

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* Other parties to this proceeding are: the Fund For A Conservative Majority, the Democratic Party of the United States, the Democratic National Committee, and Edward M. Mezvinsky.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83—

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A),[1] is not yet officially reported.

JURISDICTION

A three-judge district court was convened pursuant to 26 U.S.C. §§ 9010(c) and 9011(b) to "implement or construe" 26 U.S.C. § 9012(f). On December 12, 1983 the three-judge court entered its judgment (App. B). A timely notice of appeal (App. C) was filed on December 15, 1983. Jurisdiction is conferred

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[1] Because of the length of the district court's opinion, the Appendix to the Jurisdictional Statement has been separately bound, pursuant to Rule 15.1(j) of the Rules of this Court.

by 26 U.S.C. §§ 9010(c) and 9011(b) and by 28 U.S.C. §§ 1252 and 2101(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The full text of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001, *et seq.*, and relevant portions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431, *et seq.*, are reproduced in Appendix D.

STATEMENT OF THE CASE

A. Statutory Framework

During the 92nd Congress, two bills dealing with the regulation of campaign finance were enacted: the Federal Election Campaign Act of 1971 ("FECA"), and the Presidential Election Campaign Fund Act of 1971 ("the Fund Act"). Together, the two statutes represent a comprehensive congressional effort to minimize the corrosive effects of aggregated wealth on the integrity of the political process.

The Fund Act established the Presidential Election Campaign Fund, financed by the voluntary taxpayer check-off system, to serve as an alternative to private financing of presidential general election campaigns. Major party candidates who satisfy the eligibility requirements outlined in 26 U.S.C. § 9003 are entitled to equal payments from the fund to defray all of their "qualified campaign expenses," i.e., expenses incurred by a presidential candidate and running mate, or any of their authorized committees,[3] to further their election. 26 U.S.C. § 9002(11). A candidate choosing public financing is required to forego private contributions, except to make up for any deficiency in the Fund (26 U.S.C. §§ 9003(b)(2), 9006(a), 9012(b)), and is precluded from spending more than his or her allotment under 26 U.S.C. § 9006 (26 U.S.C. § 9012(a)). Section 9012(f) extends this spending restriction by limiting to $1,000 the amount that unauthorized political committees may expend on what would be qualified campaign expenses if incurred by the candidate.

The Fund Act's restrictions on private financing of campaigns of presidential candidates choosing public financing are part and parcel of the comprehensive scheme represented by both of these statutes. These Acts are designed to remove the corruptive effects of private financing on candidates while encouraging individual, grass roots and political party activity. *See*, for example, 2 U.S.C. §§ 431(8)(B)(i)-(v), (x), (xii); 431(9)(ii), (viii), (ix), 441a(d). This Court has upheld the overall constitutionality of the public financing system, as a statute that "furthers, not abridges, pertinent First Amendment values," *Buckley* v. *Valeo*, 424 U.S. 1, 92-93 (1976). *See also Republican National Committee* v. *FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

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[3] The term "authorized committee" is defined as any political committee which is authorized in writing by the candidates to further their election. 26 U.S.C. § 9002(1).

Appellant Federal Election Commission is the independent agency of the United States government established to administer and enforce the Fund Act, as well as the FECA and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. The Commission has the responsibility to "administer, seek to obtain compliance with, and formulate policy with respect to" all three statutes (2 U.S.C. § 437c(b)(1)), and is authorized to conduct all civil litigation concerning them. 2 U.S.C. § 437c (f)(4), § 437d(a)(6), (b), (e), § 437g(a)(6)-(11), § 437h; 26 U.S.C. §§ 9010, 9011, 9040, 9041.

Congress has vested the Commission with "exclusive jurisdiction with respect to the civil enforcement" of all of these statutes. 2 U.S.C. § 437c(b)(1). The enforcement procedures mandated by Congress require the Commission to investigate complaints confidentially, and permit it to institute enforcement litigation only after the failure of mandatory conciliation efforts and a positive vote of four of the Commission's six members. 2 U.S.C. § 437g(a)(1)-(7). The complaining party can obtain a private right of action against the respondent only if the Commission dismisses the complaint, a reviewing court determines the dismissal to be contrary to law, and the Commission fails to comply with the court's judgment. 2 U.S.C. § 437g(a)(8).

B. The Proceedings Below

On May 16, 1983, the Democratic Party of the United States, the Democratic National Committee and Edward M. Mezvinsky, the chairman of the Pennsylvania Democratic State Committee (hereafter collectively referred to as "the Democratic Party plaintiffs") filed the complaint in No. 83-2329 (E. D. Pa.) pursuant to 26 U.S.C. § 9011(b), for declaratory and injunctive relief. The complaint named as defendants the National Conservative Political Action Committee and the Fund For A Conservative Majority and alleged that those defendants had or would violate 26 U.S.C. § 9012(f). At those plaintiffs' request, a three-judge district court was convened and an expedited schedule set. On June 7, 1983, the Commission moved to intervene in the action as a party defendant for the limited purpose of moving to dismiss the Democratic Party plaintiffs' complaint. The Commission filed its motion to dismiss on June 22, 1983.

On June 13, 1983, the Commission initiated its own suit, No. 83-2823 (E.D. Pa.), pursuant to 26 U.S.C. §§ 9010(c) and 9011(b). The Commission's complaint sought a declaratory judgment that appellees' planned expenditures in connection with the 1984 presidential election campaign would violate 26 U.S.C. § 9012(f) and that that statutory provision is constitutional. On June 22, 1983, the district court granted the Commission's motion to intervene in No. 83-2329 and consolidated the two cases.

On September 20, 1983 the district court denied the Commission's motion to dismiss No. 83-2329, concluding that 26 U.S.C. § 9011(b) provides all voters in the United States with an "express private right of action" to enforce the Fund Act against private parties. On this basis, the court concluded that the Democratic Party plaintiffs had standing to bring this suit, and denied the Commission's motion to dismiss. (App. 13a-36a).[5]

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[5] Although the motion was denied orally on September 20, 1983, the rationale was first set out in the district court's final decision on December 12, 1983.

The district court issued its final decision on the merits on December 12, 1983. The court concluded that section 9012(f) chills constitutionally protected freedoms of speech and association, and that no narrowing construction of the provision would satisfactorily mitigate the overbreadth problems it found therein. The court accordingly found § 9012(f) to be facially unconstitutional under the First Amendment to the United States Constitution.

ARGUMENT

1. The district court rejected the Commission's motion to dismiss the Democratic Party plaintiffs' complaint on the ground that 26 U.S.C. § 9011(b) provides private parties with an independent right of action to enforce the provisions of the Fund Act against other private parties.[4] The court found that any voter in the United States has standing to ini-

[4] The Commission had argued that section 9011(b) was intended to permit the private parties designated therein only to sue the Commission for construction or implementation of any provision of the Fund Act which the party believed the Commission was administering incorrectly. If a private party's only recourse for perceived violations is to file a complaint with the Commission pursuant to 2 U.S.C. §§ 437c(b)(1) and 437g, a private party—like the Democratic Party plaintiffs here—which agrees with the Commission's construction and implementation of the statute, could not obtain any relief in a suit against another private party which would meaningfully enhance its sole route to relief—to seek Commission action on its administrative complaint. Thus, as the district court acknowledged (App. 26a), the Democratic Party plaintiffs' standing in this case turns upon whether they have a private right of action, independent of the Commission, to enforce the provisions of the Fund Act against private defendants.

tiate such a suit, required to be heard on an expedited basis by a three-judge district court with direct appeal to this Court, because "[i]llegal spending anywhere in the nation has the potential to affect voters everywhere" (App. 29a n. 16). This decision directly conflicts, as the district court acknowledged (App. 21a n. 12), with the holdings of the two other courts which have considered this issue. *In Re Carter-Mondale Reelection Committee, Inc.*, 642 F. 2d 538 (D.C. Cir. 1980); *Common Cause* v. *Schmitt*, 512 F. Supp. 489, 501-503 (D.D.C. 1980) (three-judge court), *aff'd by an equally divided court*, 455 U.S. 129 (1982).

The district court's decision opens the way to misuse of the provisions of the Fund Act for partisan purposes, contrary to the expressed intention of Congress, by permitting private parties to bypass completely the enforcement and conciliation procedures enacted by Congress in 2 U.S.C. § 437g, and force their political opponents into court on their own initiative. Congress established the enforcement procedures in 2 U.S.C. § 437g precisely to avoid burdening the courts and persons alleged to have violated the election laws with unnecessary and partisan litigation.

> [E]lection campaigns are the central expression of this country's democratic ideal. It is therefore essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse or for administrative action which does not comport with the intent of the enabling statute.
>
> • • • • •
>
> In addition to centralizing civil enforcement authority in the Commission, the bill takes one

> additional step to limit unjustifiable litigation burdens that might otherwise be imposed on the courts and on individuals against whom a complaint has been filed. The Commission is charged with the duty, upon receiving a complaint, to attempt to conciliate the matter for a specified reasonable period of time.
>
> • • • • •
>
> Together, the requirement of four votes for affirmative action, the broad investigatory powers granted. . . , the conciliation procedure mandated, and the substantial civil remedies provided represent a delicate balance designed to effectively prevent and redress violations, and to winnow out, short of litigation, insubstantial complaints and those matters as to which settlement is both possible and desirable.

H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 3-4 (1976).

Congress vested the Commission with "exclusive jurisdiction" over the civil enforcement of the election laws to preserve this "delicate balance" of rights and remedies, and not merely to transfer litigation authority from the Justice Department to the Commission, as the district court concluded (App. 17a-19a). When it enacted 2 U.S.C. § 437c(b)(1) in 1976, Congress clearly stated that it was using the term "exclusive primary jurisdiction"[8] in that provision in its technical legal sense, to accord the Commission jurisdiction over matters within its special com-

[8] In 1980, the Act was amended to delete the word "primary," but there is no indication that this was anything more than removal of an apparently redundant word. App. 19a n.10; *In Re Carter-Mondale Reelection Committee*, 642 F.2d at 545 n.9.

petence to the exclusion of private civil actions in courts.

> The phase "exclusive primary jurisdiction" used to describe the congressional intent to centralize the civil enforcement of the Act in the Federal Election Commission is taken from the Supreme Court's decision in *San Diego Unions v. Garmon*, 359 U.S. 236. There the Court recognized that Congress, in enacting the National Labor Relations Act, "entrusted administration of the labor policy for the nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*Garmon*, 359 U.S. at 242). On that basis the Court stated that all complaints bottomed on an alleged violation of the NLRA are within that Agency's "exclusive competence" (*id.* at 245) and that *all other tribunals* must therefore "yield to the primary jurisdiction of the National Board" (*id.*). The Court's ruling in *Garmon* captures the essence not only of the NLRA's administrative scheme, but of this Act's enforcement procedures as well.

H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 4 (1976) (emphasis added). This statement was expressly adopted by the Conference Committee. H. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 35 (1979). *Compare In Re Carter-Mondale Presidential Committee*, 642 F.2d at 545-546 n. 9, *with* App. 21a n. 12.

The district court's decision also places an unreasonable burden upon the courts which was not intended by Congress. The private suits which the district court has authorized are to be conducted pursuant to 26 U.S.C. § 9011(b), which provides for expedited consideration by a three-judge district court, with direct appeal to this Court. As the three-judge

court found in *Common Cause* v. *Schmitt*, 521 F. Supp. at 501-502:

> It would be incongruous and cumbersome for a three-judge court, ordered by Congress to expedite its consideration, to supervise extensive discovery and receive detailed factual evidence . . . A compliance issue is not properly before a three-judge court charged with implementation and construction of a congressional act; and, an expedited judgment on compliance is not appropriate to a nonexpert three-judge court evaluating in the first instance circumstances surrounding an election controversy.

The district court's expansive reading of section 9011 (b) in this case entirely ignores such practical concerns. By similarly giving no attention to the provision for direct appeal to this Court, the district court contravened this Court's admonition "'to accord "strict construction of statutes authorizing appeals" to this Court'" *Broad Political Action Committee* v. *FEC*, 455 U.S. 577, 580-581 (1982), *quoting Palmore* v. *United States*, 411 U.S. 389, 396 (1973).

In light of all these factors it is hardly credible to imagine that, without even discussing the matter in the legislative history,* Congress would have taken the unprecedented step attributed to it by the district court, of authorizing all of the millions of voters in the United States to bypass the detailed administrative enforcement procedures set out in 2 U.S.C. § 437g and institute expedited enforcement proceed-

* The brief legislative history of § 9011(b) gives no indication that enforcement of the statute's provisions is contemplated under its procedures. *See* S. Conf. Rep. No. 92-455, 92d Cong., 1st Sess. 58 (1971); 117 Cong. Rec. 45,367 (1971) (remarks of Rep. Mills).

ings against political opponents, before a three-judge district court, with direct appeal to this Court. For these reasons, the district court's decision on this issue warrants plenary review by this Court prior to the start of the presidential general election campaign in the summer of 1984.

2. This Court has already upheld the overall constitutionality of Congress' scheme for public financing of presidential election campaigns, finding it to be "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus [the Fund Act] furthers, not abridges, pertinent First Amendment values." *Buckley* v. *Valeo*, 424 U.S. 1, 92-93 (1976). *See also Republican National Committee* v. *FEC*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980). This case presents the question whether Congress has the authority under the Constitution to determine that some limit on the activities of political committees is necessary to ensure that this public financing scheme is effective in preserving the integrity of presidential elections.

As the district court observed (App. 30a), the constitutionality of an act of Congress designed to ensure the proper operation of the nation's presidential elections is an issue of national significance, "central[] . . . to the orderly functioning of the Republic." Indeed, this Court has determined once before that this issue warranted plenary review; however, the affirmance, by an equally divided Court, of the district court's decision in *Common Cause* v. *Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *aff'd by an equally divided Court*, 450 U.S. 129

(1982), has left the constitutional validity of section 9012(f), an essential component of the public financing scheme, unresolved. *See, e.g., Trans World Airlines* v. *Hardison*, 432 U.S. 63, 73 n.8 (1977).

The Fund Act is the product of more than a decade of Congressional consideration aimed at bringing meaningful reform to the area of financing presidential election campaigns. After careful consideration regarding the manner in which the public funding scheme should be implemented, Congress enacted a scheme which would serve as an alternative to, rather then merely a subsidy for, private financing. Congress intended "to make a major change that would be a tremendous improvement toward lifting the Office of the Presidency above the power of private money to control it. . . ." 117 Cong. Rec. 41,947 (1971) (remarks of Sen. Long). *See generally, Buckley* v. *Valeo*, 424 U.S. at 90-96.

The expenditure limitations lie at the core of the public funding scheme. Candidates who opt to receive public funds may not incur qualified campaign expenses in excess of the amount of public monies received under the Fund Act; they are also prohibited from accepting private financing to augment the public monies received and spent on behalf of their campaigns, other than to compensate for deficiencies in the Fund. 26 U.S.C. §§ 9003(b)(1) and (2), 9004(a)(1), 9007(b)(3), 9012(a) and (b)(1); 2 U.S.C. § 441a(b)(1)(B). Individuals and political committees are similarly prohibited from making monetary or in-kind contributions. 26 U.S.C. § 9012(b).

Section 9012(f) extends this expenditure limitation to unauthorized political committees making what would be qualified campaign expenses if incurred by a publicly funded presidential candidate. As Senator Taft noted during the Senate debates on the Fund

Act, the purpose of § 9012(f) "is to prevent any political committees from being formed as a subterfuge so that they can go beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill." 117 Cong. Rec. 42,397 (1971). This provision ensures "that the public fund will not just be [a] base for ever-increasing campaign spending." 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Phillip Hart). Congress carefully constructed the statute to avoid unnecessary infringement of individual speech, and its special limitation on political committees is amply justified by the potential of that particular type of organization to undermine the goals of the public financing scheme. *See FEC* v. *National Right To Work Committee*, —— U.S. ——, 103 S. Ct. 552, 559-561 (1982); *California Medical Association* v. *FEC*, 435 U.S. 182, 193-201 (1981). Congress' decision to set the limit at $1,000, rather than some higher figure, was also a permissible legislative judgment. *See Buckley* v. *Valeo*, 424 U.S. at 30, 83 and n.111.

In sum, the Commission submits that the district court gave inadequate consideration to Congress' judgment that this limitation on the activities of political committees is necessary to achieve the important goals of the Fund Act. Whether or not the Court ultimately agrees with this view, however, it is clear that the constitutionality of an act of Congress intended to protect the integrity of the nation's presidential elections is a matter of the highest importance, which deserves plenary consideration by this Court. Unless it is reviewed this Term, the district court's decision will ensure that the presidential general election campaign that begins next summer will be conducted in a manner which Congress has concluded

poses a real danger to the integrity of presidential elections, and which will undermine public confidence in the integrity of the federal electoral process and the honesty of government. There is, therefore, urgent need for the Court to consider this case on an expedited schedule, *see* 26 U.S.C. § 9011(b)(2), so that the constitutionality of § 9012(f) can be settled before the presidential general election campaign.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court note probable jurisdiction in this appeal, and issue a briefing schedule which will permit the Court to hear and decide this case during the current Term, prior to the commencement of the 1984 presidential general election campaign.

Respectfully submitted,

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DECEMBER 22, 1983

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APPENDIX

83-1032

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In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-2329

DEMOCRATIC PARTY OF THE UNITED STATES, and
EDWARD MEZVINSKY, PLAINTIFFS

v.

NATIONAL CONSERVATIVE POLITICAL ACTION
COMMITTEE, ET AL., DEFENDANTS

and

FEDERAL ELECTION COMMISSION, INTERVENOR

Civil Action No. 83-2823

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

NATIONAL CONSERVATIVE POLITICAL ACTION
COMMITTEE, ET AL., DEFENDANTS

[Filed Dec. 12, 1983]

Before: BECKER, *Circuit Judge*,* GREEN, and GILES, *District Judges*.

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* Honorable Edward R. Becker, United States Circuit Judge, Third Circuit Court of Appeals, sitting by designation.

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OPINION

BECKER, *Circuit Judge*. December 12, 1983

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I. *PRELIMINARY STATEMENT*

Section 9012(f) of Title 26 of the United States Code makes it a crime for a "political committee" to expend more than $1,000 to further the election of nominated presidential or vice presidential candidates who are financing their campaigns with public funds.[1] These consolidated declaratory judgment actions require us to decide whether this provision violates the first amendment guarantees of free speech and association, as recognized and interpreted by the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny. Briefly put, *Buckley* held that, while contributions to political candidates were

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[1] 26 U.S.C. § 9012(f) (1976) is part of Title VIII of the Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497, 563 (1971), as amended, commonly known as the "Presidential Election Campaign Fund Act" or "Fund Act." The Fund Act establishes a fund out of tax dollars to finance political conventions and the campaigns of nominated presidential candidates of major political parties. It regulates which presidential and vice-presidential candidates are eligible for public funding of their final presidential campaigns. It further regulates the financial practices of candidates receiving public funding.

only "proxy speech" subject to moderate constitutional protection, expenditures made on behalf of such candidates were speech fully protected by the first amendment and might be silenced only if they posed a threat of corruption or its appearance.

This is not the first time actions such as these have been brought. In *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980), the District Court for the District of Columbia held section 9012(f) to be unconstitutional on its face. That decision was affirmed by an equally divided Supreme Court without opinion. 455 U.S. 129 (1982). Because such affirmances have no precedential authority whatsoever, *see Trans World Airlines v. Hardison*, 432 U.S. 63, 73 n.8 (1977), the issue is fairly before us. Although we are not in precise accord with the entire reasoning of our District of Columbia colleagues, we echo their ultimate conclusion: section 9012(f) is unconstitutional.

The procedural posture of these suits presents an inversion of the conventional declaratory judgment action in constitutional cases. Usually the plaintiff, needing to overcome the presumption that congressional enactments are constitutional, seeks a declaration of unconstitutionality. The plaintiffs in both of these actions, the Democratic National Committee and Edward Mezvinsky (plaintiffs in No. 83-2329) and the Federal Election Commission (plaintiff in No. 83-2823) seek a declaration that section 9012(f) is constitutional. This procedural anomaly, coupled with the apparent dormancy of section 9012(f) until the summer of 1984, when the major parties will select their presidential and vice presidential candidates, impels us to consider *sua sponte* whether the cases are now justiciable within Article III of the Constitution. The action brought by the Democrats and Mr. Mezvinsky, the Chairman of the Pennsylvania Democratic Committee and a voter, also presents another significant procedural problem—whether the group of statutes of which section 9012(f) is a part permits private parties to enforce its prohibitions, or whether it reserves that right exclusively to the Federal Election Commission.

Our methodology in this opinion is as follows. After briefly recounting in Part II the procedural developments in the cases, we address the issue of justiciability, including standing and ripeness, in Part III. We first conclude that 26 U.S.C. § 9011(b) permits private parties such as the Democratic National Committee to bring this declaratory judgment action before this three-judge district court. We so conclude, notwithstanding other statutes that might appear to restrict enforcement powers to the Federal Election Commission. Having found statutory standing, we then turn to the constitutionality of section 9011(b) as applied in this case. We conclude that, based on the unique circumstances of this case, section 9011(b)'s authorization of these actions does not violate the restriction of Article III of federal court jurisdiction to "cases and controversies." We further conclude in Part III that the suits brought by the Democrats and the FEC are ripe for adjudication.

Having found both suits justiciable, we then analyze in Part IV the facial constitutionality of section 9012(f), proceeding along traditional overbreadth lines as set forth in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). From an examination of the Fund Act, of which section 9012(f) is a part, and of the Federal Election Campaign Act (FECA), a closely related statute, we first determine the type of conduct and speech that section 9012(f) is intended to prohibit.

Basing our analysis on an exposition of *Buckley* v. *Valeo* and a discussion of how subsequent decisions by the Supreme Court may have modified the holdings of that case, we then determine what speech and conduct relating to presidential campaigns Congress may not legitimately prohibit. Because *Buckley* and its progeny allow restrictions on true campaign speech only to prevent corruption or its appearance, we focus on the extent to which conduct barred by section 9012(f) has led to corruption or the appearance thereof in recent political history.

We find that the plaintiffs have produced virtually no evidence of actual corruption and little admissible evidence of the appearance of corruption. We also focus on the potential for the conduct barred by section 9012(f) to corrupt or create the appearance of corruption. We find that, while some extremely large and professionally managed expenditures made independently of the candidate's official campaign may create the appearance of corruption, most of the expenditures banned by section 9012(f) pose no such threat. We then look for a plausible narrowing construction of section 9012(f) that would limit its focus to only those potentially harmful expenditures. We find none. We thus hold that section 9012(f) violates the first amendment to the Constitution because it threatens to chill and to punish much speech that Supreme Court decisions have held to be protected.

II. PROCEDURAL HISTORY

The first action (No. 83-2329) was filed on May 1, 1983, by the Democratic Party of the United States and Edward Mezvinsky,[3] against the so-called "PAC

[3] Unless otherwise indicated, a reference to "The Democrats" in this opinion includes both the Democratic Party and Mr. Mezvinsky.

defendants," the National Conservative Political Action Committee ("NCPAC"), and the Fund for a Conservative Majority ("FCM"). Defendant NCPAC is a nonprofit organization under the laws of the District of Columbia organized primarily to influence elections by making contributions or by making expenditures either in support of favored (generally conservative) candidates or against disfavored (generally liberal) ones. Defendant FCM is a Virginia corporation and engages in similar activities.

The Democrats, noting that the defendant PACs have announced their intention to spend substantial funds on behalf of President Reagan in 1984, seek a declaration that section 9012(f) of Title 26 of the United States Code is constitutional, at least on its face.[4] Pursuant to 26 U.S.C. § 9011(b)(2), a three-judge court was constituted to hear the case. The PAC defendants moved to dismiss this suit under Fed. R. Civ. P. 12(b)(1) on the theory that the Democrats lacked statutory and constitutional standing to bring the action, and that this court accordingly lacked statutory and constitutional subject matter jurisdiction. They were joined in this motion—at least with respect to statutory standing—by the Federal Election Commission ("FEC"), which intervened as defendants in the case for that limited purpose. The PAC defendants also moved to transfer venue to the District Court for the District of Columbia under 28 U.S.C. § 1404(a) (1976).

The second action (No. 83-2823) was filed on June 14, 1983, by the FEC against the same defendants seeking declaratory relief similar to that ultimately

[4] The Democrats originally demanded injunctive relief against NCPAC and FCM. They then amended their complaint to delete this demand for relief.

requested by the Democrats. The same three-judge court was constituted to hear the case. Upon motion by the Democrats and pursuant to Fed. R. Civ. P. 42, we consolidated the two cases for all purposes.

On September 13, 1983, after briefing and supplemental briefing by the parties, we heard extensive oral argument on the pending motions to dismiss and the motion to transfer venue. For the reasons now set out in Part III of this opinion, we denied the motions.

The case was called for final hearing on October 27, 1983. The parties called no witnesses at that time. Instead, they relied on 201 stipulations and three books of related exhibits they had previously agreed upon as the factual record. The parties had developed these stipulated facts during September and early October in the wake of several case management conferences held by Judge Gilen, a member of this panel. We received this evidence,[5] and the briefs filed in the case by the parties and amici.[6] We also heard extensive oral argument. We now grant judgment for the defendants for the reasons set out in Part IV of this opinion.

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[5] Some of the evidence was received subject to objection as to its admissibility. However, the court did not admit into evidence the results of several polls proffered by the plaintiffs for the purpose of showing the public's perception of corruption stemming from the activities of PACs. *See infra* part IV.C.3(b)(i).

[6] The court has been materially aided in its deliberations by the briefs and oral argument of two amici, Common Cause, which has aligned itself with the Democrats and FEC, and the American Civil Liberties Union, which has aligned itself with the PAC defendants. We express our appreciation to the amici for their submissions, which were of extraordinarily high quality.

III. JUSTICIABILITY

A. *Statutory Subject Matter Jurisdiction*

1. *The Contentions*

The Democrats and FEC predicate the statutory subject matter jurisdiction of this three-judge court on 26 U.S.C. § 9011(b).[7] Section 9011(b) allows the FEC, the "national committee of any political party, and individuals eligible to vote for President . . . to institute such actions, including actions for declaratory judgment or injunctive relief as may be appropriate to implement or *contrue* [sic] any provision of this chapter[.]" including section 9012(f). The plaintiffs maintain and the defendants apparently do not challenge the proposition that a declaration of section 9012(f)'s constitutionality would constitute a construction of that provision.

The PAC defendants and the FEC maintain, however, that 2 U.S.C. § 437c(b)(1) (1982), which is part of the FECA, implicitly repeals section 9011(b)

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[7] The Democrats also claim that federal courts have statutory subject matter jurisdiction of this case under the general federal question statute, 28 U.S.C. § 1331 (Supp. V 1981). While we assume this assertion to be correct, *but cf.* Brown v. General Services Administration, 425 U.S. 820, 834-35 (1976) (noting that specific statutory grants of subject matter jurisdiction can displace more general grants), general federal question jurisdiction is insufficient to permit this three-judge district court to decide the case. This three-judge district court has jurisdiction only by dint of 26 U.S.C. § 9011(b)(2), which requires proceedings instituted pursuant to 26 U.S.C. § 9011(b)(1) to be heard "by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code . . . ." Thus, the jurisdiction of this court turns on whether 26 U.S.C. § 9011(b)(1) authorizes private parties, such as the Democrats, to bring actions of this nature.

and bars anyone but the FEC from enforcing section 9012(f). Section 437c(b)(1), last enacted as part of Title I of the 1979 amendments to FECA, provides:

> The [FEC] shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of Title 26. The Commission shall have *exclusive jurisdiction* with respect to the civil enforcement of such provisions.[7]

(Emphasis added). Both the PAC defendants and the FEC believe that this provision prevents private parties like the Democrats from bringing this action, which they style as being "one in the nature" of an action for enforcement.

The PAC defendants' and FEC's other argument against statutory subject matter jurisdiction over the Democrats' suit is, in essence, that allowing this private action would subvert the regime of "Judicial Supervision" established by Congress in 2 U.S.C. § 437g (1982) for enforcing FECA and the Fund Act and would substitute a regime of "Maximum Enforcement."[8] The defendants note that section

[7] Section 9012(f) is included within Chapter 95 of Title 26.

[8] The terms "Judicial Supervision" and "Maximum Enforcement" are borrowed from Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1193, 1208 (1982). Judicial Supervision refers to a system in which only an agency may bring an action to enforce a regulatory norm. If the agency fails, however, to bring such an action, a private party can sue the agency to force it to do so. Under a system of Maximum Enforcement, both private parties and agencies can enforce regulatory norms. Moreover, private parties can initiate actions against the enforcing agency if they believe it has failed to enforce the laws.

437g establishes an elaborate, administrative remedy available to private parties who believe that violations of the Fund Act or the FECA are occurring. Section 437g allows private parties to complain to the FEC, which, after exhausting administrative processes, can sue the alleged violators. If the FEC fails to avail itself of these remedies, 437g(a)(8) allows aggrieved parties to sue the FEC in the District of Columbia in order to compel the FEC to pursue a "civil action to remedy the violation involved . . . ." If the FEC fails to bring such an action, then and only then may the private party sue directly to enforce the FECA or Fund Act. If private parties could sue violators of the Fund Act without exhausting these other remedies, the defendants' argument continues, requiring private parties first to complain to the FEC would be pointless.[9]

[9] Another possible objection to the statutory subject matter jurisdiction of this three-judge court—and one initially posed by the court itself—stems from 2 U.S.C. § 437h (1982), part of FECA. That provision states that actions for declaratory judgments to construe the constitutionality of any provision of "this Act" are to be brought before a district court, which is to certify the case to an en banc panel of the circuit court of appeals for that district. If "this Act" as used in § 437h encompassed the Fund Act, then we should have dismissed this case referred to the in banc Third Circuit Court of Appeals.

All the parties submit that "this Act" refers exclusively to FECA and that section 437h is thus irrelevant. Their belief is predicated on § 431(19), which states "[t]he term 'Act' means the Federal Election Campaign Act of 1971, as amended." They distinguish cases such as Clark v. Valeo, 559 F.2d 642, 645 n.2 (D.C. Cir.), *aff'd mem. sub nom.* Clark v. Kimmitt, 431 U.C. 950 (1977), in which the en banc court of appeals heard constitutional challenges to the Fund Act as being, in effect, exercises of "pendent jurisdiction" by those courts, for in those cases, the circuit courts were presented with chal-

The Democrats advance two responses to the defendants' challenge. First, they state that their suit is not an action to *enforce* the Fund Act, but rather to obtain a construction of the Act. Thus, § 437c(b)(1) is inapplicable. Second, they say that the Court should not read § 437c(b)(1) implicitly to repeal § 9011(b). Rather, § 437c(b)(1) should be understood only as divesting other government agencies, which formerly had some responsibility for civil enforcement of the Fund Act, from continuing in that civil enforcement role.

2. *Discussion*

Interpreted literally, section 9011(b) seems to authorize any voter in the United States to obtain a construction of the Fund Act and to implement its terms. Yet, there is a sharp tension between section 9011(b)'s apparent call for universal standing to enforce the Fund Act and section 437c(b)(1)'s apparent restriction of standing to the FEC alone. Two principles guide us, however, to the conclusion that section 9011(b) authorizes this suit by the present private plaintiffs. First, "[t]he starting point in every case involving construction of a statute is the language itself." *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 558 (1979). Here the language of the statute itself seems plainly to authorize these plaintiffs to seek a construction of section 9012(f). Second, if there is a conflict between the directives of two statutes, it is the general duty

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lenges to both FECA and the Fund Act and heard the case in conjunction with a three-judge court. We agree with the parties and confess that our initial concerns were misplaced. Section 437h is not relevant to the cases before us now because we deal only with a construction of the Fund Act.

of the court to attempt reconcilation. Implied repeal is the interpretation of last resort. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974). Here reconciliation is possible.

(a) *The Evolution of 9011(b) and 437c(b)(1)*

The intertwined evolution of the Fund Act and FECA shows that the Democrats' understanding of section 437c(b)(1)'s limited purpose is plausible. Congress established in the 1971 Fund Act a right of national political committees and individuals eligible to vote for president to sue for injunctive, declaratory or other relief (as appropriate) to "implement or construe" any of its provisions, including section 9012(f). *See* 26 U.S.C. § 9011(b)(1). This right was created to assure public and private fidelity to the substantive norms created by the Act.

Later in 1971, Congress also enacted FECA, in a form substantially different from today's statute. Federal Election Campaign Act, Pub L. No. 92-225, 86 Stat. 3 (1972). Under the 1971 FECA, the Comptroller General carried out administrative and investigatory duties, *id.* § 308(c)(1), (d)(1), but only the Attorney General of the United States could institute a civil action for violations of the statute's provisions. *Id.* § 308(d)(1).

In the 1974 amendments to FECA, Congress created the FEC to replace the Comptroller General. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 208, 88 Stat. 1263 (1974). It invested the FEC with administrative and investigatory duties, and with some civil enforcement powers. To make clear its intent to divest the Comptroller General and the Attorney General of most of the powers they had held under the 1971 Act, Con-

gress stated that the "Commission has primary jurisdiction with respect to the civil enforcement" of the Act. *Id.* § 310(b). The 1974 amendments to FECA left significant enforcement power in the hands of the Attorney General, however. Under the newly added sections 314(a)(6) and 314(a)(7), for example, if the FEC believed a violation of the FECA or of certain criminal provisions situated in Title 18 of the United States Code to be occurring, it was obliged to request the Attorney General to bring appropriate civil-injunctive or criminal actions.

In the 1976 amendments to FECA, Congress finally centralized that all governmental civil enforcement of the Act in the FEC. According to the legislative history of the new amendments, under the 1971 Act and 1974 amendments:

> enforcement responsibility was fragmented, and the line between improper conduct remediable in civil proceedings and conduct punishable as a crime blurred . . . . [Therefore] the Committee concluded that it was appropriate to simplify and rationalize the present enforcement system.

H.R. Rep. No. 917, 94th Cong., 2d Sess. 3. Congress accomplished its goal by repealing the criminal provisions formerly situated in Title 18 of the United States Code, *see* Federal Election Campaign Acts of 1976, Pub. L. No. 94-283, § 201(a), 90 Stat. 496 (1976), by essentially reenacting those provisions as part of FECA itself, *see id.* § 112, and by authorizing the FEC itself to bring civil actions to stop violations of FECA, *see id.* § 109. In keeping with this desire to consolidate governmental enforcement responsibilities, Congress used the word "exclusive" in what would be codified as 2 U.S.C. § 437c(b)(1). *See id.* § 101 (amending what was then section 309

(b) of FECA, which established the powers of the FEC)." In view of this history, it would appear that section 437c(b)(1) was enacted by Congress to make clear that only the FEC, and no other *governmental* authority, would have jurisdiction to enforce the two Acts.

(b) *The Legitimacy of Maximum Enforcement: Conclusion*

Congress' establishment of Maximum Enforcement regimes elsewhere in the law damages the FEC's implicit argument that Congress could not conceivably have wanted Maximum Enforcement here. It is simply not correct to maintain that, because it makes a private right of initiation less important, Maximum Enforcement makes no sense. In adopting the Fund Act, Congress could reasonably have concluded, as it did in enacting a provision the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (Supp V. 1981), a provision of the Energy Policy and Conservation Act, 42 U.S.C. § 6305 (1976 & Supp V. 1981), and of the Clean Air Act, *id.* § 7604, that a right of private initiation is a useful supplement to a private right of action in assuring fidelity to a regulatory norm.

Moreover, we note that Congress explicitly ceded the opportunity—which it took advantage of with respect to the FECA—to create a regime of Judicial Supervision rather than one of Maximum Enforcement. In 2 U.S.C. § 437d(e) (1982), a section of

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[∞] In 1980 the language of section 437c(b)(1) was changed to eliminate the word "primary." Pub. L. No. 96-187, 105(6), Title I, Jan. 8, 1980, 93 Stat. 1354, 1366. This change from "primary exclusive" to "exclusive" eliminates what appears to be redundant language.

FECA distinct from § 437(c)(b)(1), which we herein construe, Congress stated that suits brought by the FEC would be the only method for enforcement of FECA aside from the limited private right of initiation contained in section 437g. Apparently, and contrary to its behavior regarding numerous other provisions of FECA, Congress chose not to extend this provision of FECA to cover the Fund Act as well."

In view of the foregoing discussion, we hold that private plaintiffs have the statutory right to bring suit under section 9011(b) to obtain a construction of the Fund Act."

" This differing treatment of private rights of action under the Fund Act and private rights of action under the FECA are possibly justified by a perception that agency enforcement proceedings after attempts at conciliation, *see* 2 U.S.C. § 437g (a)(4)(A), or private rights of initiation followed either by agency enforcement or private action, *see* 2 U.S.C. § 437g(a)(8)(A), (C), are too slow to effectively secure adherence to the substantive norms of the Fund Act during the critical period between July or August (the months of the presidential nominating conventions) and election day in November. We acknowledge, however, that this justification finds no specific support in the legislative history and that private rights of initiation may also prove too slow to deal with late-breaking violations in non-presidential elections. *Cf.* Durkin for U.S. Senate Committee v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9147 (D.N.H. 1980) (denying writ of mandamus to force FEC to hurry enforcement of FECA, but recognizing deficiency of FECA in not permitting rapid resolution of violations occurring in critical period just before election).

" Our holding is fully consistent with numerous cases cited by the FEC wherein courts have denied private rights of action under FECA. *See* Durkin for U.S. Senate Committee v. FEC, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9147 (D.N.H. 1980); Walther v. FEC, 82 F.R.D. 200, 202 (D.D.C. 1979);

Walther v. Anderson, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9085 (D. Minn. 1979); Walther v. Biden, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9084 (D. Del. 1979); *In re* Federal Election Campaign Act Litigation, 474 F. Supp. 1044 (D.D.C. 1979); Walther v. Barnett, 474 F. Supp. 1051 (D.D.C. 1979); Walther v. Baucus, 467 F. Supp. 93, 94 (D. Mont. 1979); Common Cause v. FEC, 82 F.R.D. 59, 60 (D.D.C. 1979). We agree with those courts that 2 U.S.C. § 437d(e) bars private rights of action with respect to FECA, but, for the reasons stated in text, we do not believe that this doctrine should be extended to the Fund. Cort v. Ash, 422 U.S. 66, 74-76 (1975) and Gabauer v. Woodcock, 594 F.2d 662, 673 (9th Cir.), *cert. denied*, 441 U.S. 941 (1979), also cited by the FEC in support of its position, are likewise distinguishable. Both deal with attempts at enforcement, whereas this suit by the Democrats instead seeks only a construction or declaration. Moreover, neither *Cort* nor *Gabauer* deals with an attempt to enforce the Fund Act. And both suits involved attempts to imply rights of action from a since-repealed criminal statute. Here we have an express private right of action.

We must note, however, that our holding today rests in considerable tension if not outright opposition to that of the District of Columbia Circuit in *In re* Carter-Mondale Reelection Committee, Inc., 642 F.2d 538, 542-43, 545 n.9 (D.C. Cir. 1980), which read the legislative history of section 437c (b)(1) to preclude private plaintiff suits under the Fund Act, at least suits to stop the FEC from certifying a presidential candidate as eligible to receive federal funding of his campaign. Although the court's reading of the House Report concerning the 1976 amendments to FECA is thoughtful, we believe the court there erred by focusing too narrowly on the language of the report and insufficiently on the plain language of section 9011 as well as the limited scope of 2 U.S.C. § 437d(e). Indeed, it was this failure to consider the explicit provisions of the Fund Act that prompted Judge Wald's powerful concurrence in the case. *Id.* at 548, 549 n.2.

Our holding is also incompatible with that of the three-judge district court in the almost-identical case of Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided court*, 455 U.S. 129 (1982). There the court dismissed

B. *Constitutional Subject Matter Jurisdiction: Standing and Ripeness*

It is a commonplace of modern federal practice that before adjudicating the merits of a dispute, a court must find that the proposed relief actually benefits the litigant complaining in some "concrete" way. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-43 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973). Concomitantly, the court must also find that the conduct of the defendant injures or threatens injury to the plaintiff. This injury need not be to a recognized legal interest, *see Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), but it must be more than harm to a state of affairs that the complaining party pleads merely to be desirable, *see Sierra Club v. Morton*, 405 U.S. 727 (1972).

In cases where the harm is only threatened, plaintiffs must pass another barrier before courts may constitutionally address their case on the merits and award them relief. Courts must find that the case is "ripe," that is, that the need for a current adjudica-

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for lack of statutory subject matter jurisdiction a claim brought by a private plaintiff, Common Cause, apparently to enforce the ban of the Fund Act on expenditures by political committees. As did the court in the *Carter-Mondale* litigation, the district court reasoned that section 437c(b)(1) allowed only the FEC to enforce the Fund Act. *See Schmitt*, 512 F. Supp. at 502-03 & n.55. Although we believe this understanding of section 437c(b)(1) is incorrect, it is also important to note that lack of statutory subject matter jurisdiction was but an alternative holding by the court there. The *Schmitt* court also relied on the failure of Common Cause to state a cause of action against the PACs; the proscriptions cited by Common Cause in their pleadings barred actions only by candidates, not by independent political committees. 512 F. Supp. at 508.

tion outweighs the dangers of adjudication based on an incomplete factual record or on circumstances that may never eventuate.

These requirements of Article III rest in imperfect harmony with the availability of declaratory relief, which appears only to allow a court to advise the parties to the litigation of its point of view on a particular matter. Ever since *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937), however, it has been settled that declaratory relief is not unconstitutional per se. Courts nonetheless have an obligation in each case legitimately seeking declaratory relief under a statute or other provision to ensure that the requirements of Article III are met.

1. *Standing*

(a) *The Contentions*

The PAC defendants argue that the Democrats lack Article III standing to bring a declaratory judgment action.[16] They contend that none of the conduct in which they have engaged or may engage harms the Democrats. Their supplemental brief, filed in response to questions propounded by the court, is clear and concise:

> [The Democrats] complain that defendants are trying to persuade voters to vote for Ronald Reagan and against the nominee of the Democratic Party. That is true. It is also politics. But it is not the sort of direct and palpable injury to plaintiffs which confer Article III standing.

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[16] The PAC defendants concede that the FEC has constitutional standing to bring this action. The court chooses, however, to consider this issue sua sponte. *See infra* note 17.

They then argue that, even if the conduct of the PAC defendants cognizably injures plaintiffs, a finding that section 9012(f) constitutionally allows the judiciary to stop such conduct does the private plaintiffs no good. As private parties, plaintiffs lack power to bring a criminal prosecution under 9012(f); only the attorney general can do that. And, whatever may be their power to "implement or construe" the Fund Act through actions brought under section 9011(b), private parties, the PAC defendants say, have no power under that statute or any other to enforce by means of civil injunction the criminal prohibitions of section 9012(f); that remedy is left to the FEC alone. 2 U.S.C. § 437d(a)(6). Finally, it is submitted that even if the FEC's civil enforcement process might ordinarily be benefitted (through stare decisis or issue preclusion) by a judgment for the private plaintiffs in their action, the FEC's seeking of almost identical relief in a consolidated action renders this factor irrelevant.

The Democrats have several responses to this forceful attack upon our constitutional jurisdiction. To show injury in fact, they cite the recent Supreme Court cases of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982), and *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979), for the proposition that, while courts normally have power to determine whether a claimed hurt creates the "injury in fact" needed to confer standing on the complaining party and jurisdiction upon the court, Congress has considerable power to override these determinations. The Fund Act's plain language, the argument continues, coupled with a reading of its legislative history, reveals that Congress considered any uncertainty surrounding interpretation of the Fund Act

itself injurious to entities such as national political parties, which must understand the system of finance in which they seek electoral support. The Democrats seemingly recognize that this putative justification for standing may override the case or controversy requirement of Article III and authorize purely advisory opinions. They therefore also argue that, because the PAC defendants are threatening to violate section 9012(f) on a massive scale and thereby subvert the system of public finance created by the Fund Act, a failure to adjudicate this case will leave them unable to know how to go about best raising funds for the presidential election in 1984. The Democrats add that, at all events, the likely attacks of the PAC defendants upon the Democrats' nominee threaten judicially cognizable injury.

With respect to the redressability of any injury suffered, the Democrats argue that a ruling by the court that section 9012(f) is not unconstitutional on its face would facilitate future enforcement of the Fund Act, particularly in view of the short interval between political conventions and elections. Congress authorized enforcement, in section 9011(b), they say, by giving private parties the right to "implement" the provisions of the Fund Act by means of injunctive relief.

(b) *Discussion*

Counsel has not brought to our attention any other case that has dealt with the issue of Article III standing in actions brought to uphold the constitutionality of suspect statutes. The only other suit of which we are aware in which a party even sought such relief is this suit's elder sibling, *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by*

en equally divided court, 455 U.S. 129 (1982). There, the district court never reached the constitutional standing issue, because it found equitable relief to be inappropriate with respect to one count of the complaint by the private plaintiff and (we think erroneously) found no statutory standing with respect to a second count of the complaint involving an attempt by the private plaintiff to enforce the Fund Act.

Whether private plaintiffs have standing in this declaratory judgment action turns largely on whether private plaintiffs may ultimately enforce the provisions of the Fund Act, including section 9012(f), by means of civil injunction actions brought during the final presidential campaign. If so, a judgment here that section 9012(f)'s substantive prohibitions are not unconstitutional on their face clears the way for rapid adjudication of disputes arising under section 9012(f), and thus benefits the plaintiffs. Through principles of issue and claim preclusion, the requested declaratory judgment would eliminate the complex defense of facial unconstitutionality that might otherwise bog down subsequent enforcement litigation and prevent both private plaintiffs and the FEC from enjoining spending that violates section 9012 (f) before its attendant damage is irreversibly wreaked during the brief period between party conventions and the election.[*] We conclude that, by significantly heightening the practical effectiveness of statutory remedies, the declaratory judgment sought

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[*] There is, of course, no problem with effectively requiring possible defendants to raise the defense of facial unconstitutionality in this court rather than in a direct enforcement proceedings. *See* Yakus v. United States, 321 U.S. 414 (1944).

here is capable of surmounting the redressability requirement of Article III."

Although the issue is far from clear, we believe that section 9011(b)'s language, which allows private plaintiffs to bring injunctive actions "to implement" any provisions of the Fund Act, authorizes private plaintiffs to seek civil injunctions during the final presidential campaign to stop spending that violates section 9012(f). While we recognize that the word "to implement" is not identical to the word "enforce," and that Congress used the latter term when granting the FEC the right to bring injunctive actions to stop violations of the Fund Act, *see* 2 U.S.C. § 437d(a)(6), the verb "to implement" surely encompasses enforcement actions. Webster's defines the verb "to implement" as being "to carry out . . . to give practical effect to and to ensure of actual fulfillment by concrete merits." *Webster's Third New International Dictionary* 1134 (1961). An action for injunctive relief to ensure compliance with section 9012(f)'s ban on expenditures by political committees in support of eligible presidential candidates would certainly give practical effect to and ensure

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[*] Although their concessions are not binding on this court, which has an independent obligation to consider whether Article III standing exists, Smith v. Spina, 477 F.2d 1140 (3d Cir. 1973), it is worth noting that the PAC defendants appear to accept the legitimacy of the theory that heightening the efficacy of a later statutory remedy may serve as the basis for standing in a predicate declaratory judgment action. The PAC defendants accept that the FEC has constitutional standing in its suit against them; yet the FEC's constitutional standing would seem to rest only upon the ability of a declaratory judgment to heighten the effectiveness of later enforcement actions brought by them under 2 U.S.C. § 437d(a)(6) or 26 U.S.C. 9011(b).

actual fulfillment of section 9012(f) by concrete measures. We can find no warrant to strip "implement," as used in section 9011(b), of its ordinary meaning. We thus conclude that a declaratory judgment is capable of benefitting the private plaintiffs here in a judicially cognizable fashion.

We now turn to the question whether there is a judicially cognizable injury to the plaintiff stemming from the PAC defendants' threatened conduct. We hold that there is a threatened injury. To begin with, we take judicial notice that the political power of the Democratic Party depends significantly on whether its nominee comes to occupy the White House. Thus, speech that reduces the likelihood of its nominee's victory injures the Democratic Party in more than an ideological way. The speech of PACs may be politics and it may be protected by the Constitution, but, like any other speech, it can also hurt.

In addition, the uncertainty surrounding the constitutionality of section 9012(f) may injure the Democrats (though not plaintiff Mosvinsky) by compelling them to expend fund-raising and administrative resources in anticipation of the result of enforcement litigation brought against the PAC defendants during the final presidential campaign. If section 9012(f) is struck down in that enforcement litigation, PACs will be able to spend as they please. Under such circumstances, the Democrats might choose to forgo public financing of their own campaign and would have been best advised to focus on private fund raising before the conventions for use thereafter. If section 9012(f) is upheld in enforcement litigation, however, PAC spending will be all but banned. The Democrats might have done better, then, to focus their fund raising efforts on the pre-convention

period, when the Fund Act is not in force. Thus, either the Democrats must expend administrative and fund raising resources in anticipation of either eventuality or take a tremendous gamble in anticipation of what they regard as the most likely result. A declaratory judgment now spares them this dilemma.[16] Thus, we believe that section 9011(b) is constitutional insofar as it gives statutory standing to the private plaintiffs in this action."[17]

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[16] We also believe that the plaintiffs also have constitutional standing under the principles announced in Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 109-15 (1979), and Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972). In those two cases, the Supreme Court held that the Fair Housing Act was constitutional to the extent that it conferred a private right of action on all members of a sufficiently cohesive community whose housing had been segregated in violation of the statutory norms of the Act to remedy such violations. Although the community at issue here—the nation—is considerably broader than that to which the Supreme Court permitted standing to be accorded in *Gladstone* and *Trafficante*, so too is the potential geographic impact of the prohibited practices. Illegal spending anywhere in the nation has the potential to affect voters everywhere.

[17] The FEC also has constitutional standing to bring this lawsuit. Its ability to enforce the Fund Act is significantly aided by a declaratory judgment that section 9012(f) is not unconstitutional on its face. Although a declaration to that effect would not prevent the PAC defendants from arguing that the statute was unconstitutional as applied, it would nonetheless greatly simplify and expedite the enforcement process by clearing away a complex issue that might otherwise bog down proceedings. Further, the FEC may have standing to bring this lawsuit on the grounds that the judgment in *Common Cause v. Schmitt*, which establishes that section 9012(f) is unconstitutional, strips away the good faith immunity of its officials under Harlow v. Fitzgerald, 102 S. Ct. 2727 (1982), that might otherwise serve as a defense to a *Bivens* action in

While so holding, we underscore the narrowness of our determination. We stress that, but for the centrality of the issues decided today to the orderly functioning of the Republic, the extraordinarily short time available between the party nominating convention and the election, and the celerity with which speech can be transmitted through media, doing damage in a hurry and before a case can be decided, we might well have come to a different conclusion. The normal "remedy" for agencies or private parties wishing to enforce constitutionally questionable statutes is still to attempt enforcement. The constitutionality of the statute—at least as applied—will, in almost all other cases, be vindicated by a judgment adverse to a defendant interposing a constitutional defense.[18]

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the event they attempt to enforce the provision. *But cf.* Yaselli v. Goff, 275 U.S. 503 (1927), *aff'g*, 12 F.2d 396 (2d Cir. 1926) (giving absolute immunity to federal prosecutors).

[18] There is one more procedural problem, which, though not raised by any of the parties, is nonetheless important at least to air. It may perhaps best be classified as a problem of indispensable parties. Litigation over the facial constitutionality of a statute is, in significant respects, inherently a true class action; through stare decisis alone, decisions in such cases can affect the rights and interests of individuals and associations not formally parties to the litigation. Yet not all disputes are formally certified as a class action under Fed. R. Civ. P. 23.

In the conventional action to declare a statute facially unconstitutional, we do not worry that the failure to follow the ritual of Fed. R. Civ. P. 23 will unconstitutionally prejudice unnotified absentees, *cf.* Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950), or absentees not adequately represented by the parties, *cf.* Hansberry v. Lee, 311 U.S. 32 (1940). We assume those wanting the statute upheld and those wanting it struck down are adequately represented. The government or its agencies, which are generally an adequate representative of those seeking to uphold the statute, are usually a party to such suits, and, under 28 U.S.C. § 2403 and Fed. R. Civ. P. 24(c), are notified of such suits and have a right to intervene in instances where they are not a party. The energy required to prosecute a facial constitutional challenge usually assures the court that those opposing the statute are adequately represented.

In actions such as these to declare a statute facially constitutional, however, the worries must be greater. There is little assurance that the defendant selected by the government or private plaintiff to oppose the facial constitutionality of the statute will be an adequate representative of others opposing the statute's facial constitutionality. In this case, however, we do not believe that we need formally certify this case as a defendant class action in order to go forward. The PAC defendants, which are sizeable organizations represented by extremely competent counsel, have shown themselves to be worthy champions of those speaking against section 9012(f). The participation of the American Civil Liberties Union as an amicus has also assuaged any worries we had concerning adequacy of representation.

[19] For reasons not entirely clear to the court, the PAC defendants have waived ripeness objections to the suit brought by the FEC, even though the ripeness problem in that suit is virtually identical. Of course, this waiver is valid only to the extent that ripeness is not a constitutional barrier to justiciability.

2. *Ripeness*

(a) *The Contentions*

The PAC defendants' contention that the suit by the Democrats is not ripe rests on what they regard to be the significant possibility that the illegal spending feared by the Democrats may never come about.[19] Although the defendants have announced their intention to raise funds for President Reagan, they point out that by choice or chance Ronald Reagan, the candidate they now support, might not be the nomi-

nee of the Republican Party. They also point out that the opinions of their own organizations might change with respect to President Reagan."[30]

The Democrats respond that, because the passage of time will not produce facts capable of enhancing this court's evaluation of section 9012(f)'s constitutionality, because PAC spending either for Reagan or against its nominee will injure its candidate seriously before a lawsuit could proceed to injunctive relief, and because any waste of judicial resources caused by adjudication of a dispute that may never eventuate is outweighed by the harm resulting from the failure to adjudicate that dispute now, this case is ripe."[31]

(b) *Discussion*

There is no tidy formula for determining when the main battles of a dispute lie so far in the future that

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[30] On September 13, 1983, for example, the day of oral argument on these issues, the Philadelphia Inquirer reported that NCPAC was threatening to cancel its plans to raise $5 million towards President Reagan's reelection to protest the United States government's alleged lack of firmness in response to the Soviet downing of Korean Airlines Flight 007.

[31] Amicus Common Cause buttresses this assertion by arguing that, if disaffection of the PAC defendants for President Reagan or President Reagan's failure to run for reelection renders this case moot between the time we issue a decision and the time (it presumes) the Supreme Court hears it on appeal, our decision will not become a derelict. Under United States v. Munsingwear, 340 U.S. 36, 39 (1950), "[t]he established practice of this Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *See* County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979). *But see infra* note 28.

its present adjudication in court constitutes a violation of Article III's requirement that federal courts adjudicate only cases and controversies. The Supreme Court has counseled that "'[t]he basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."'" *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (*quoting Railway Mail Association v. Corsi*, 326 U.S. 88, 93 (1945). The very vagueness of its proffered standard demonstrates, however, the verity of its prior confession that "[t]he difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Id.* at 297.

Nonetheless, it is clear from Supreme Court case law that a court must consider several factors in determining whether the Article III minima are satisfied. First, the court must consider the extent to which present adjudication will necessarily deprive the court of facts that are of critical relevance to thoughtful disposition of the legal issues in the case and that only the future might reveal. *See Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 81-82 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143-48 (1974). Second, the court should consider the extent to which its failure to adjudicate will, as a practical matter, deprive the litigants of an effective and peaceful resolution of the battle that looms ahead. *Duke Power*, 438 U.S. at 81-82. Finally, although we are hardly certain that this is an Article III requirement rather than simply a rule of prudence, a court should consider the extent to which it might waste its valuable

dispute-resolving and peacekeeping resources by adjudicating disputes that never erupt rather than devoting its energies to the hot spots of the legal landscape.

After consideration of these factors, we are of the belief that this suit is ripe. As will be shown in our resolution of the merits, a determination of the constitutionality of section 9012(f) turns on virtually no adjudicative facts. And the relevant legislative facts, *e.g.*, conclusions about the perceptions of corruption resulting from PAC expenditures and the relationship of section 9012(f) to effective speech by individuals and associations, are as available now as they will be a year hence during the heart of the final presidential campaign.

Indeed, what will not be available a year from now is the time to think carefully about the constitutional issues involved. With fidelity to our mandate under section 26 U.S.C. 9011(b)(2), we have attempted to "cause the case to be in every way expedited," yet the need to resolve preliminary matters such as those addressed in part III of the opinion, the necessity for some discovery, the development of a factual record, and the effort involved in resolving the difficult constitutional and jurisprudential issues inevitably implicated in actions of this sort, has consumed over six months from the filing of the first complaint. We believe we would have been hard pressed to resolve thoughtfully a case of this complexity and import and to give effective relief—including the critical preliminary injunction—if this suit were brought during the heat of a campaign. And if hearings on the case were delayed until after the 1984 political conventions, it is unlikely that the Supreme Court would be able to definitively resolve the issue in time to affect

the 1984 presidential campaign. *But see New York Times Co. v. United States* (The Pentagon Papers Case), 403 U.S. 713 (1971) (Supreme Court deciding prior restraint case with extreme speed). Adjudication of this case now is critical to a definitive resolution of the important issues presented and, had we found section 9012(f) constitutional, would have been critical to an effective remedy being provided the plaintiffs. *Cf. Roe v. Wade*, 410 U.S. 113, 125 (1973) (modifying usual mootness analysis for cases "capable of repetition, yet evading review").

Finally, while we confess our discomfort about basing judicial decisions on our own subjective assessment of the future course of American politics, we cannot blind ourselves to reality. As of this date, it is certainly more than speculation that Ronald Reagan will be the presidential nominee of the Republican Party and that, as he did last time and as every other major party candidate has done since the enactment of the Fund Act, will accept public funds for his campaign.[35] It is also more than speculation that the PAC defendants will support President Reagan by making expenditures in violation of section 9012(f). They have said repeatedly that they intend to do so. Moreover, even if President Reagan is not the nominee, the PAC defendants may well spend heavily on behalf of the Republican nominee or against the Democratic nominee. Thus, while it is always possible that the defendants here will not violate section 9012(f), that possibility is also, in our view, sufficiently unlikely to render imprudent our decision to devote judicial resources to resolution of this dis-

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[35] The ripeness issue would be considerably more difficult if the defendants here proposed to support a non-incumbent.

pute.[28] We conclude, therefore, that both the suit brought by the Democrats and the suit brought by the *FEC* are ripe under Article III of the Constitution.[29]

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[28] In our determination of ripeness, we do not rely on the possibility that the subsequent mootness of this dispute and vacatur of our judgment pursuant to the *Munsingwear* line of cases, *see supra* note 21, significantly reduces the harmfulness of our adjudication of an unripe dispute. To begin with, any such holding by this court based upon such a notion has the potential to subvert the ripeness requirement itself, something the Supreme Court has never done. Moreover, the fact that our decision would, under such circumstances, be stripped of its precedential value points all the more to our having wasted our resources on the dispute in the first place.

[29] The PAC defendants also moved to transfer venue pursuant to 28 U.S.C. § 1404(a) (1976) to the District of Columbia. When examined in light of the facts of this case, we find the PAC defendants' justifications for a transfer of venue to be unpersuasive. The PAC defendants failed to advise us that they would be calling any witnesses, *see* Atlantic Richfield, Co. v. Stearns-Rogers, Inc., 379 F. Supp. 869, 871-72 (E.D. Pa. 1974), and, in fact, like all other parties in the case, never did call any witnesses. The only evidence submitted were documents, which could be fitted in a large briefcase and transported easily and cheaply from the District of Columbia area to Philadelphia, the site of the proceedings. This mobility of evidence argues against transfer of venue. *See* C. Wright, A. Miller & E. Cooper, 15 *Federal Practice & Procedure* § 3853, at 279 & n. 2 (1976) (*citing cases*). The ease of transportation between the District of Columbia area and Philadelphia also obviates any serious inconvenience to the PAC defendants arising out of the need of their counsel to attend hearings here.

Another reason offered for transferring venue to the District of Columbia is that it allows the plaintiffs to forum shop and subvert the finality of the judgment in *Common Cause v. Schmitt*. We believe, though, that the defenses of res judicata and collateral estoppel in their traditional forms adequately

IV. THE MERITS

A. *Introduction*

We now turn to the question whether or not section 9012(f) is unconstitutional on its face.[30] Our analysis on this matter is in terms of the first amendment overbreadth doctrine. As initially denominated in *NAACP v. Button*, 371 U.S. 415 (1963), and as refined in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), that doctrine requires us to strike down a statute if a substantial portion of the conduct it prohibits, taking permissible narrowing constructions of the statute into account, is protected by the first amendment. The polar case of overbreadth is, of course, facial invalidity. Under such circumstances, all (or almost all) of the conduct the statute bars is constitutionally protected.

The theory behind the overbreadth doctrine, which is unusual in that it allows individuals to challenge

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protect the defendants from any subversion of judgments that might result from our refusal to transfer venue. These defenses are inapplicable here. Defendant FCM expressly waived any res judicata or collateral estoppel defense it might have against the *FEC* stemming from the 1980 decision in *Common Cause v. Schmitt*. Res judicata and collateral estoppel generally do not apply to the other parties, because they were not parties to that litigation. The transfer of venue is not necessary.

[30] Section 9012(f) has been the subject of some commentary in periodical literature. *See Adamany, PAC's and the Democratic Financing of Politics*, 22 Ariz. L. Rev. 569 (1980); Claude & Kirchhoff, *The "Free Market" of Ideas, Independent Expenditures, and Influence*, 57 North Dakota L. Rev. 337 (1981); Note, *The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns*, 18 Harv. J. Legis. 679 (1981).

what government says in its statutes rather than what government does pursuant thereto, *see generally* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970), is well understood. The very existence of a statute may chill protected expression of vital importance to this nation's exercise in popular sovereignty. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). "[P]ersons contemplating privileged action which collides with a law may be discouraged from testing the constitutional issue, though their claim to immunity would presumably be vindicated if they proceeded in the teeth of the statute and were set upon by the state." Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. at 854; *accord Broadrick v. Oklahoma*, 413 U.S. at 612. The chill is too high a price to pay to permit the normal case-by-case process to carve a statute down to a constitutionally permissible form.

Overbreadth analysis essentially relies on a spatial metaphor. It literally envisions the conduct proscribed by a statute to encompass some area and then inquires into whether a sufficiently substantial portion of that area also lies in a constitutionally protected zone. But, of course, neither the verbal prohibitions of a statute nor physical instances of conduct are genuinely spatial. Implicit, therefore, in any overbreadth analysis is some sort of theory that assigns area to statutory prohibitions or instances of conduct.

Because of the requirement that we translate statutory prohibitions and conduct into the idiom of overbreadth, that doctrine leaves us with two tasks in this case—tasks that structure the remainder of our opinion. In section IV.B., we define the contours of

the statute in question, 26 U.S.C. § 9012(f). To determine the most essential prohibitions of section 9012(f)—and, to continue the metaphor, to determine which prohibitions are assigned the most area—requires an initial understanding of that provision's place in the acts of Congress to which it is most intimately related: the Fund Act and FECA.

Section IV.C. conducts the second task. It assesses in light of *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, what conduct now found to be within the coverage of section 9012(f) Congress may (and may not) legitimately bar. The first subsection analyzes the *Buckley* case itself, long a landmark and trouble spot on the legal landscape. That analysis suggests that two factors are of paramount importance in determining the constitutionality of campaign finance regulation: whether the statute bars speech fully protected by the first amendment (subsection 2), and whether the statute protects against corruption or its appearance (subsection 3). This last subsection in turn requires a detailed examination of the evidence adduced by plaintiffs relating to the existence vel non of campaign-expenditure-related corruption in the Reagan administration.

Finally, in section IV.D. we evaluate whether the statute is in fact unconstitutionally overbroad.

B. *The Statutory Scheme: Section 9012(f)'s Role in the Fund Act, and FECA*

To understand the contours and focus of section 9012(f), it is essential to have an overview of the statutes governing the financing of presidential election campaigns. Section 9012(f) of title 26 of the United States Code is part of the "Fund Act," a set of statutes establishing a fund out of tax dollars to

finance political conventions and campaigns of nominated presidential candidates of major political parties. *See supra* note 1. Although only "major party" candidates are eligible to spend money from the fund, no presidential candidate is "eligible" for public funding unless he chooses to accept public funding.

Eligibility for public funding under the Fund Act brings into play a number of regulatory provisions, many of which are contained in the various subsections of section 9012. By examining these provisions, we may determine what section 9012(f) is not designed to regulate. Section 9012(f) is not intended to prohibit eligible candidates (and the national committees of the parties that selected them) from spending money other than out of the publicly established fund. That goal is taken care of by section 9012(a), the constitutionality of which has been upheld.[29] *Republican National Committee* v. *FEC*, 445 U.S. 955 (1980), *aff'g* mem., 487 F. Supp. 280 (S.D.N.Y.) (limit held constitutional because candidate's acceptance of public funds is voluntary). Nor is section 9012(f) designed to prohibit eligible candidates and their authorized committees from accepting contributions to defray "qualified campaign expenses," a term that 26 U.S.C. § 9002(11) defines to be expenses incurred by the candidate, his running mate or by an authorized person to further one's campaign or that

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[29] 26 U.S.C. § 9012(a)(1) reads:

> It shall be unlawful for an eligible candidate of a political party for President and Vice President in a presidential election or any of his authorized committees knowingly and willfully to incur qualified campaign expenses [defined in § 9002(11)] in excess of the aggregate payments with which the eligible candidates of a major party are entitled under section 9004 with respect to such election . . . .

of a running mate. That goal is met by section 9012(b),[30] which is presumably constitutional under *Buckley*, which upheld similar restrictions, 424 U.S. at 23-35.

While these last two subsections of section 9012 deal with expenditures by, or contributions to, eligible candidates, section 9012(f), the text of which is set out in the margin,[31] deals with an entity known

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[30] 26 U.S.C. § 9012(b)(1) reads:

> It shall be unlawful for an eligible candidate of a major party in a presidential election or any of his authorized committees knowingly and willfully to accept any contribution to defray qualified campaign expenses . . . .

[31] Section 9012(f) reads as follows:

> (1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.
>
> (2) This subsection shall not apply to (A) expenditures by a broadcaster regulated by the Federal Communications Commission or by a periodical publication, in reporting the news or in taking editorial positions, or (B) expenditures by any organization described in section 501(c) which is exempt from tax under section 501(a) in communicating to its members the views of that organization.
>
> (3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000 or imprisoned not more than one year, or both.

any other group of persons,"[20] from making "*contributions*" to candidates for federal office, including the presidency and vice presidency, exceeding $1,000. "Contributions," as used in section 441a is a term of art, however, and includes some payments commonly thought of as expenditures. Section 441a(a)(7)(B)(i) states that "expenditures in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." For purposes of this opinion, these contribution/expenditures shall be referred to as "coordinated expenditures."

The prohibition of 2 U.S.C. § 441a against coordinated expenditures thus leaves section 9012(f) of the Fund Act with its greatest impact on what the FECA refers to in section 431(17) as "independent expenditures." It must be noted, however, that section 9012(f) also affects regulation of coordinated expenditures. Until the presidential candidate is receiving public funding under the Fund Act, the FEC can seek only civil remedies against those making coordinated expenditures. After the presidential candidate is receiving public funds, however, section 9012(f) also renders coordinated expenditures subject to criminal penalties.

C. *What Conduct Within the Scope of Section 9012(f) May Congress Bar*

1. *Analyzing Buckley v. Valeo*

Having determined the scope and emphasis of section 9012(f), we now turn to the issue of what conduct within the scope of section 9012(f) Congress may legitimately prohibit. Resting heavily on *Buck-*

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[20] Thus, section 441a covers political committees such as the defendant PACs.

ley v. Valeo, 424 U.S. 1 (1976), the PAC defendants argue that section 9012(f) is facially unconstitutional. We thus believe it helpful to begin with an analysis of what *Buckley* held and did not hold.

Buckley dealt with a multifaceted constitutional attack on numerous provisions of the Fund Act and FECA as they then existed. Most relevant to the analysis here is the Supreme Court's disposition of various challenges to limits contained in FECA on the amount that individuals could contribute to campaigns ($1,000 to any single candidate and no more than $25,000 overall) and the amount that individuals could spend on their own, "relative to a clearly identified candidate" ($1,000). The Supreme Court struck down the expenditure limitations as a violation of the first amendment but upheld the limits on contributions against first amendment attack.

(a) *Expenditures are Speech*

Buckley held that limits on expenditures were limits on speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19 (footnote omitted).[20]

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[20] In his dissent, Justice White denied that limitations on expenditures were direct limitations on speech.

> Since the contribution and expenditure limitations are neutral as to the content of speech and are not motivated by fear of the consequences of the political speech of particular candidates or of political speech in general, this case depends on whether the nonspeech interests of the Federal Government in regulating the use of money in political campaigns are sufficiently urgent to justify the incidental effects that the limitations visit upon the First Amendment interests of candidates and their supporters.

424 U.S. at 259-60 (White, J., dissenting).

(b) *Contributions are only Proxy Speech*

The *Buckley* court sharply differentiated between the constitutionality of limitations on expenditures and limitations on contributions:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. . . . [T]he size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 20-21 (footnote omitted). The speech inherent in contributions has since been termed "proxy speech."

(c) *Associational Freedoms*

The *Buckley* Court noted that both contribution and expenditure limitations impinge on the associational freedoms recognized in cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958). The expenditure limitations were most serious, however, because they "preclude[d] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Id.* at 21. Contribution limits still allowed the contributor to become a member of an association or "to assist personally in the association's efforts on behalf of candidates." *Id.*

(d) *The Centrality of Corruption*

If not from the *Buckley* opinion itself, it is clear from the interpretation of that case in *Citizens Against Rent Control v. City of Berkeley*, 102 S. Ct. 434 (1981), that the prevention of corruption and its appearance provide the only legitimate basis for regulating speech resulting from campaign finance. It is no longer permissible to justify campaign finance regulation on grounds that it mutes the voices of the affluent and thereby equalizes the ability of all citizens to affect the outcome of elections. Nor is it still permissible to justify financing limits as a way of braking rising costs of political campaigns. Contribution limits were warranted, the court said in *Buckley*, because the integrity of our system of representative democracy would be undermined if

large contributions were given to secure a political *quid pro quo*. 424 U.S. at 26-29. And even if there were no actual *quid pro quo*, Congress could also legitimately regulate campaign finance on grounds that confidence in government might be undermined if the people erroneously believed corruption resulted from a campaign finance method. *Id.* at 27.

(e) *Examining Corruption*

The *Buckley* court examined on its own the ability of each campaign finance limitation to thwart corruption[*] and found limits on contributions tightly tailored to anti-corruption goals. It had problems, however, with using the proffered anti-corruption goal as a basis for justifying limits on expenditures. It rejected the argument that, because coordinated expenditures had the same potential for corruption (or its appearance) as contributions, the expenditure limitation imposed by FECA could be upheld. Under FECA, the Supreme Court noted, coordinated expenditures were treated as contributions. The FECA expenditure limit thus really prohibited only "express advocacy of candidates made totally independently of the candidate and his campaign. *Id.* at 47. Yet these independent expenditures might prove counterproductive or valueless. Consequently, there was much less danger of a quid pro quo.

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[*] Whether this scrutiny of Congressional goals withstands the Court's subsequent decision in FEC v. National Right to Work Committee (NRWC), 103 S. Ct. 552 (1982), is a subject we shall examine. *See infra* part IV.C.3(a)(3).

2. *Does Section 9012(f) Bar Speech Fully Protected by the First Amendment?*

(a) *The Contentions*

The PAC defendants' substantive argument (and that of amicus ACLU) goes as follows. According to *Buckley*, expenditures by political committees constitute speech protected by the first amendment. Political committees exist as a conduit to permit persons of limited means, but of like ideological persuasion, to combine their modest contributions in a way that enables them to multiply the effects of their own speech and to be heard in this media-dominated world. As the Supreme Court realized in *Buckley*, effective speech takes a lot of money; only by pooling money with others can the average citizen disseminate a message other than one premised by the major political parties. Section 9012(f)'s bar on expenditures thus seriously diminishes the ability of the average citizen to speak effectively in electoral campaigns.

Truly independent expenditures, the type section 9012(f) is most intended to bar, *see supra* part IV.B., do not, the argument continues, create a threat of corruption or a reasonable threat of its appearance. The Supreme Court made this fact clear in *Buckley* by striking down a bar on independent expenditures. Since deterrence of classical corruption in the form of a *quid pro quo* (or its appearance) is the only permissible reason to limit speech, and since fear of corruption is not a legitimate reason to uphold the constitutionality of section 9012(f), that provision must fall as unconstitutional.

The Democrats, the FEC, and amicus Common Cause make several arguments that criticize this

"simple" theory of the *Buckley* case. One set of arguments attempts to distinguish *Buckley* on its facts from the case at bar. A second set attempts to construe *Buckley* in light of subsequent Supreme Court decisions.

We begin our analysis by treating the plaintiffs' attempts to distinguish the expenditure limit involved in *Buckley* on the grounds that it barred groups and individuals from spending money on behalf of a candidate. Section 9012(f) by contrast leaves individuals and some associations free to spend as much as they please; only "political committees" are barred. Organization as a "political committee" is not necessary to effective speech, the plaintiffs argue; individuals and entities unregulated by section 9012 (f) may still effectively carry their messages to the public.

In attempting to show the ability of individuals and groups to speak without resort to the "political committees" whose conduct is limited by section 9012 (f), the Democrats point to the following "facts."[*] They note that purchase of a sixty-second spot on Philadelphia's most popular radio station during the most popular listening time costs only $400. In areas of lesser listenership or on stations of lesser magnitude, radio advertising is considerably cheaper. In the Scranton-Wilkes Barre area of Pennsylvania, for example, a sixty-second spot costs but $20.

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[*] The evidentiary status of these "facts" is somewhat doubtful. They derive largely from an affidavit by Sheldon Schartberg, the president of a Pennsylvania advertising agency. While the defendants have put forth no evidence that anything said by Mr. Schartberg is incorrect, they have not stipulated to his expertise in this area. Nonetheless, we shall assume for purposes of this opinion that Mr. Schartberg is correct in his assertions.

The Democrats also assert that average individuals or small groups can afford the traditionally more expensive media, television and newspapers. According to an uncontradicted affidavit from a putative expert, the Democrats say that the average cost of a thirty-second spot on a popular network morning news program is only $450 for broadcast in Philadelphia. A network prime-time thirty-second spot costs $4,000. Newspaper advertisements that are two columns wide and five and a quarter inches high costs from $1,400 per day in the *Philadelphia Inquirer*, to only $60 per day in a paper of lesser circulation such as the *Easton Star-Democrat*.

(b) *PACs Amplify Individual Speech*

We reject the proposition that in today's high-priced economy individuals will be able to speak as effectively with a thousand-dollar limit on the political committees they form as they would without such limitations. Perhaps the single most telling piece of evidence in favor of our perception concerning the efficacy and importance of political speech by PACs is the number of individuals who contribute to them. According to stipulated facts, during the 1979 election cycle, 101,000 people voluntarily parted with an average of $75, relinquished the opportunity to organize on a small scale and purchase small advertisements saying exactly what they wanted in the *Easton Star-Democrat*, forebore the opportunity to draft and narrate a radio spot for airing on a few small town radio stations, and instead gave their money to NCPAC. According to similarly stipulated facts, another 100,000 citizens gave average contributions of $25 to defendant FCM.

These contributors realized, or certainly should have realized, that they had little control over the PAC's immediate use of their money. They knew that they would not draft the advertisements or decide on whom the money would be spent. They did know, however, that the defendant PACs were sending a message that they liked and one that they wanted others to hear. These citizens believed that, given the economies of scale inherent in modern advertising, and the abilities of professionals to persuade more powerfully, their voice is louder when spoken by a PAC.

While we are not saying that 100,000 NCPAC contributors can't be wrong, we will want far more evidence than plaintiffs have begun to offer before we allow even Congress to stifle so many citizens' preferred method of expression. Those who choose to contribute to political committees rather than spend the money themselves are making a mature choice that Congress must respect absent some compelling countervailing consideration. Wthout irrefutable evidence that these citizens are wrong, or without some compelling countervailing principle recognized by the Supreme Court, we dare not render ineffective their method of expression. In short, we agree with the PAC's contentions that PAC speech is amplified individual speech presumptively entitled to full constitutional protection.

(c) *Justifying 9012(f) as a Regulation on Corporate Speech*

The plaintiffs also contend that we should distinguish between the impact of section 9012(f) on the speech of individuals and its effect on the speech of conglomerate or corporate organizations such as the

defendant political committees. They continue that, because many PAC contributors have no control over the material put forth by the PACs, and because such material is slickly "professional," any restraint on the speech of individuals caused by section 9012(f) is only a restraint on the "proxy speech," which the Supreme Court has repeatedly held subject to lesser first amendment protections than "true speech" with a complex message. *See Buckley*, 424 U.S. at 20-21. The only restraint on true speech resulting from section 9012(f) is a restraint on corporate speech, the plaintiffs conclude, and such restraints are permissible under the Supreme Court decisions in *FEC v. National Right to Work Committee* (NRWC), 103 S. Ct. 552 (1983), and *California Medical Association v. FEC* (CMA), 453 U.S. 182 (1982). Indeed, they imply that *NRWC* has overruled *Buckley*.

We reject the proposition that *NRWC* and *CMA* undermine our conclusion that section 9012(f) stifles political debate protected by the first amendment absent some compelling countervailing consideration. It is true that in those cases the Supreme Court stated that Congress could regulate the speech of individuals in formal association differently than that of individuals alone.[53] It is also true that certain

[53] *But see* First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent work of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.") (footnotes omitted). *See also id.* at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972)"); Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 437 (1981) ("The Court has acknowledged the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues."); NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.").

These latter cases are consistent with an interpretation of *Buckley* that sees the opinion there focusing not so much on the first amendment rights of the speaker, but on the right of the public to receive information and ideas. *See* Island Trees Union Free School District No. 26 v. Pico, 102 S. Ct. 2799, 2808 (1982) (plurality opinion); *id.* at 2812 (Blackmun, J., concurring).

language in the *NRWC* case suggests that Congress has significant powers to regulate the speech of corporations such as those of the PAC defendants here. But we believe that several factors caution against extension of the language and holdings of those two cases to the facts of the case at bar.

One major factor distinguishing *NRWC* and *CMA* from these cases emerges from a simple examination of the facts in the cases. Neither *NRWC* nor *CMA* dealt with an expenditure limit. CMA, most of which was a plurality opinion, dealt with the constitutional right of political committees to contribute to entities known as multipolitical committees, political committees which support candidates for several offices. The *NRWC* case dealt with the constitutional right of corporations without capital stock to solicit funds from persons other than pre-existing members.

Nonetheless, the plaintiffs correctly note that a unanimous Supreme Court justified the solicitation limits at stake in *NRWC* by analogizing to the related and constitutionally justified ban on corporations spending money in support of candidates. The key quotation follows:

> The first purpose of § 441b, the government states, is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions. *See United States v. United Automobile Workers*, 352 U.S. 567, 579 . . . (1957). The second purpose of the provisions, the government argues, is to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed. *See United States v. CIO*, 335 U.S. 106, 113 . . . (1948).
>
> We agree with the government that these purposes are sufficient to justify the regulation at issue.

103 S. Ct. at 559.

Notwithstanding this quotation, the justifications offered by the Supreme Court in *NRWC* do not fully apply to the statute at issue here. The first justification offered, one that may well have been necessary to the holding in that case, speaks only in terms of corporate *contributions*. The concern is that large corporate contributions to candidates will corrupt.

Accord Buckley v. Valeo. But, as we have seen, section 9012(f) is not concerned with contributions. Its major focus is independent expenditures. Unless the plaintiffs can demonstrate that independent expenditures have the same corrupting potential as contributions or coordinated expenditures, the language of *NRWC* is inapplicable.

The second justification offered in *NRWC* also is not fully applicable to the case at bar. Where the ideology of a political committee is clear, and where there is no pre-existing, potentially coercive corporation-employee or union-employee relationship between the contributor and the receiving organization, there is little danger that the money of contributors will go to support candidates they oppose.[24] While this jus-

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[24] Of course, it may well be that there was also little danger of such coercion in the *NRWC* case itself. The National Right to Work Committee is, as we understand it, an ideological organization. Unlike corporations or unions with primarily economic goals, it would seem to have little ability to coerce its members into making contributions ultimately used for candidates its members do not support. If the National Right to Work Committee terminated the membership of those who refused to go along with its spending plans, the terminated members would hardly be hurt. Thus, the Supreme Court may have had different views about the coercive potential of nonprofit, largely voluntary organizations such as the PAC defendants here, in which case this basis of ours for distinguishing *NRWC* is incorrect. We believe, however, that the Supreme Court was making a broader point about the legitimacy of Congress' banning contributions by corporations and the permissibility of Congress' failure to differentiate between corporations without capital stock that solicit from members, and ordinary corporations soliciting from stockholders and employees. *See* NRWC, 103 S. Ct. at 560 ("While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more for-

tification might authorize Congress to bar political committees from soliciting funds without disclosing whom they intend to support, it is not capable of justifying the wholesale restrictions on speech created by section 9012(f).

Most importantly, *NRWC* is distinguishable in that it dealt with corporations, a creature of positive law that has traditionally been treated as sui generis. We read *NRWC* as a corporations case. As 26 U.S.C. § 9002(9) makes clear, however, political committees need not be incorporated. Any "committee, association, or organization (*whether or not incorporated*) which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the nomination of election of one or more individuals to federal, state or local elective public office" runs afoul of section 9012(f).

In sum, we do not read NRWC as overruling *Buckley* or as disturbing the result we reach here.[40] Ac-

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tunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.")

[40] Indeed, even if *NRWC* overrules cases such as Buckley v. Valeo and First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), to the extent that those cases bar Congress from prohibiting corporate spending on election campaigns, we still have serious problems with section 9012(f), because that provision explicitly allows corporate spending. So long as the corporation is a periodical publication or an FCC regulated broadcaster or a tax-exempt organization, section 9012(f)(2) makes clear that 9012(f)(1) does not bar the corporation from spending as much as it pleases on behalf of presidential candidates. *Cf.* Powe, *Mass Speech and the Newer First*

cordingly, we remain firm in our belief that, as a matter of law, *see Connick v. Myers*, 103 S.Ct. 1684, 1690 n.7 (1983), the expenditures barred by section 9012(f) are fully protected speech.

3. *Does Section 9012(f) Prevent Corruption or Its Appearance?*

Our conclusion that an independent expenditure by a political committee is speech strongly protected by the first amendment does not end our inquiry into the permissibility of section 9012(f). The first amendment is not an absolute; a sufficiently compelling reason, such as preventing corruption of government or preventing the appearance of corruption, can justify some abridgements. Analysis of this question must be preceded, however, by a clarification of our "scope of review" over previous findings by Congress and the Supreme Court concerning the corruptive potential of the conduct banned by section 9012(f).

Amendment, 1982 S. Ct. Rev. 243, 268 ("If a newspaper is allowed to reach and propagandize so many readers, why should citizens be prevented from banding together and trying to counter it?"). Moreover, if we were not deciding this case on first amendment grounds and if defendants had pressed the argument, we might have serious problems with the statute on equal protection grounds. We have some initial difficulty in seeing how a political committee that happens to operate a periodical publication but that makes independent expenditures in support of a presidential candidate is any more or less likely to create an appearance of corruption thereby than an organization such as NCPAC or FCM. Indeed, if Congress can limit corporate spending and Congress wished to do so in section 9012(f), it wrote a very strange statute.

(a) *Scope of Review*

(i) *The Impact of NRWC*

The plaintiffs argue that *NRWC* overrules or further explains *Buckley* to the extent that the latter allowed the courts to examine whether Congress was correct in fearing corruption from a given practice. The argument is, in essence, that in *NRWC* the Supreme Court adopted the position of Justice White in his dissent in *Buckley* that unelected judges should defer to the expertise of elected legislators in determining whether specified campaign practices have the potential to corrupt. *See* 424 U.S. at 261. The key quotation cited from the *NRWC* opinion is: "Nor will we second guess a legislative determination as to the need for prophylactic measures when corruption is the evil feared." 103 S.Ct. at 560. In plaintiff's submission, then, the mere proffer of an anti-corruption justification for section 9012(f) provides a satisfactory rationale for its existence.

Taken literally the Supreme Court's opinion in *NRWC* might be construed as precluding us from independently examining whether section 9012(f) is needed to stop corruption. We are confident, however, that the Supreme Court did not intend to so rule. Judges have a solemn obligation to strictly scrutinize the justifications offered by legislators for their statutes when, as here, those statutes abridge free speech. Chief Justice Burger has summarized a half-century of jurisprudence on this point well:

> Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. In *Pennenkamp v. Florida*, *supra*, 328 U.S. 311, at 335, Mr. Justice Reed observed that this Court is

> 'compelled to examine for [itself] the statements in issue and the circumstances under which they were made to see whether or not they do carry a threat of clear and present danger to the impartiality and good order of the courts or whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.'

Mr. Justice Brandeis was even more pointed in his concurrence in *Whitney v. California*, 274 U.S. 357, 378-379 (1927):

> '[A legislative declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature.'

A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legis-

lative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978); *accord Connick v. Myers*, 103 S.Ct. 1684, 1692 n.10 (1983). *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (proffered anti-corruption rationale for statute limiting political contributions subject to judicial scrutiny).[36]

(ii) *The Buckley Findings*

We do agree with the plaintiffs, however, that the *Buckley* court's perception about the inutility to the campaign of truly independent expenditures was not intended as an assertion of eternal truth, but rather was intended merely as a statement of what then appeared on the record before it. If there is new and significant evidence before this court showing that section 9012(f) prevents corruption in the form of a quid pro quo, or that it prevents the appearance of corruption, *Buckley*'s non-adjudicative fact findings would not appear to prevent us from upholding the constitutionality of section 9012(f).

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[36] We also believe that the court's post-*Buckley* decision in *Bellotti* sufficiently rebuts an inference that might otherwise be drawn from Justice Rehnquist's opinion in *NRWC* that the court had adopted Justice White's critique of *Buckley* and held that, because Congress has far greater expertise than cloistered judges in determining what corrupts and what does not, our scrutiny should be limited when fear of corruption is the suggested motive for legislation. It is more plausible to interpret Justice Rehnquist's comments as urging courts not to insist on excessive fine-tuning of statutes that *legitimately* stop corruption.

(b) *Plaintiff's Evidence*

Having established our power to examine plaintiffs' evidence concerning the existence vel non of corruption or its appearance, we now proceed to do so. Our examination is limited at this point to a review of the evidence submitted and its admissibility in light of the relevancy and hearsay rules. *See* Fed. R. Evid. 401, 403, 801, 802, 803.

(i) *The Polls*

Plaintiffs offered the results of two nationwide telephone surveys as important evidence of a public perception of corruption stemming from PAC spending. The first poll they cite is one of 910 voters by the Harris organization, conducted in early April and released in late May of 1983. Harris asked voters 19 questions, each of which had the following format. "Many business, labor, and other groups have formed political action committees, or PAC's that support and give money to candidates for office. How much would you trust [a certain type of political action committee] if that group were to support and give money to a candidate for president in 1984—a great deal, somewhat, not very much, or not at all." The pollsters read this query 19 times, each time substituting the name of one of 19 types of political action committees.[37]

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[37] According to stipulated facts, as of July 1, 1983, there were 3,461 political committees eligible to make independent expenditures for the 1984 presidential elections. Some of the political committees are purely ideological, i.e., there is no independently existing business or labor enterprises to which they are formally or otherwise attached. Other political committees are attached to specific firms, unions, or groups of firms and unions. Noteworthy among this latter category is the beer industry's political action committee, not surprisingly denominated SIXPAC.

The results of this poll, which are set out in the margin,[58] ostensibly show distrust of political action committees. Sixty-two percent of those polled, for example, said they would "not at all" or "not very much" trust a "labor union PAC" that supported and gave money to a candidate for president in 1984. Thirty-five percent said they would trust such political committees "somewhat" or "a great deal." Fifty-six percent distrusted "a business corporation PAC." Sixty percent distrusted "NCPAC, or the National Political Conservative Committee." [59]

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[58] TRUST IN PACS THAT GIVE MONEY TO A PRESIDENTIAL CANDIDATE

	A Great Deal	Somewhat	Not Very Much	Not At All	Not Sure
A consumer organization PAC	19	42	18	17	4
A pro-environmental PAC	15	36	24	20	5
A pro-nuclear-freeze PAC	12	31	25	26	6
A pro-ERA, or Equal Rights Amendment, PAC	11	33	26	26	4
An anti-abortion PAC	11	22	24	39	4
A pro-gun-control PAC	10	25	25	35	5
An anti-gun control PAC	9	20	26	35	4
A pro-abortion PAC	7	29	27	32	5
An AFL-CIO PAC	7	29	27	32	5
An insurance company PAC	7	28	29	32	4
A labor union PAC	7	28	30	32	2
An oil industry PAC	7	24	28	37	4
A business corporation PAC	6	34	30	26	4
A banker's PAC	6	30	29	30	5
A pro-Moral Majority PAC	6	26	27	35	6
An anti-ERA, or Equal Rights Amendment, PAC	5	23	30	37	5
A chemical industry PAC	5	21	32	36	6
A realtors' PAC	4	34	30	26	6
NCPAC, or the National Political Conservative Committee	4	28	32	28	8

[59] It is not clear that the voters surveyed knew what "NCPAC or the National Political Conservative Committee" was. Indeed, we would be astonished if sixty percent of those polled could even say what NCPAC was the abbreviation for. The survey may thus be more of a referenda on the political committee's ideology, as revealed by the poll, than on its contributions.

We hold the results of this poll inadmissible on two independent grounds. First, plaintiffs submitted the polls to the defendant a scant three weeks before trial. Taking into account the need of the defendants to study the methodology of the poll and the availability of the poll results to plaintiffs well before the time at which they were proffered, their admission into evidence would be unduly prejudicial, and we held it untimely. Fed. R. Evid. 403. Alternatively, we hold the poll results to be irrelevant. The Harris poll's question focused on public trust in political action committees that supported or contributed to campaigns. But massive public distrust in *political committees* cannot save section 9012(f). Only distrust in the integrity of government engendered by the conduct proscribed by section 9012(f)'s prohibitions can save the statute. The Harris poll provides no evidence on this point.

The second poll proffered by the plaintiffs was conducted specifically for the Democratic Party by the Roper Organization. Roper telephoned a nationwide sample of 1,004 people, age 18 and up, between September 30 and October 1, 1983. The organization asked a series of five substantive questions, some of which had multiple parts.

The first question on the Roper survey went as follows: "There are a number of different kinds of people and organizations that a candidate for President might receive campaign contributions from. For each one would you tell me whether you think a candidate should be able to accept any amount he is offered, or

accept no more than $1,000, or accept nothing at all from that source?" Respondents were read eight groups, which ranged from "organized gambling interests" to "ordinary citizens." In general, the public favored some restrictions on the amounts candidates could accept.[40] Fifty-four percent of those polled, for example, said that candidates should be able to accept nothing or no more than $1,000 from "ordinary citizens." Seventy percent thought they should be able to accept nothing or no more than a thousand dollars from "special issue groups like gay activists or anti-abortion groups." Sixty-five percent said they thought they should be able to accept nothing or no

[40] The detailed results of the poll are as follows:

We are just about one year away from the 1984 Presidential election. I'd like to ask you a few questions about your opinion on how presidential campaigns should be financed.

There are a number of different kinds of people and organizations that a candidate for President might receive campaign contributions from. (READ LIST OF GROUPS BELOW). For each one would you tell me whether you think a candidate should be able to accept any amount he is offered, or accept no more than $1,000, or accept nothing at all from that source? First is Labor Unions.

	Any Amount	$1,000	Nothing	D.K.
Labor unions	25%	37	31	7
Business corporations	29%	40	25	6
Ordinary citizens	42%	38	16	4
Millionaires	40%	38	17	5
Right wing conservative groups	24%	35	30	11
Left wing liberal groups	21%	35	31	13
Special issue groups like gay activists or anti-abortion groups	22%	32	38	8
Organized gambling interests	20%	23	51	6

more than a thousand dollars from "right wing conservative groups."

Any respondent who had answered that a candidate should not be allowed to accept anything or more than a thousand dollars from any of the eight listed groups was then asked his reasons for so believing: "[I]s it because it could give one candidate an unfair advantage over the others, or is it because it could give the contributing organization too much power and influence over the man who might be our next president, or is it because it would just put too much money into election campaigning, or what?" Respondents could give more than one answer to the question. The most popular answer (chosen by sixty percent of those asked) was that contributions greater than $1,000 gave "the contributing organization too much power and influence over the man who might be our next president."[41]

We hold the results of the first two Roper questions to be inadmissible. Their late submission did not give the defendants an adequate opportunity to examine the poll's methodology or the accuracy of its results. Fed. R. Evid. 403. Moreover, the responses to the first and second questions are irrelevant. Fed. R. Evid. 401. The first and second questions inquired into the corruptive potential of campaign *contributions*. The results show that the public agrees with the Supreme Court's analysis in *Buckley*. Contributions can corrupt. But this litigation has nothing to

[41] Twenty percent of those asked said that they favored the restrictions because it "would just put too much money into election campaigning." Sixteen percent thought it "could give one candidate an unfair advantage over the others." Six percent gave other responses that the Roper Organization does not specify.

do with contributions. The issue is whether *independent expenditures* have the potential to corrupt or create the appearance of corruption. On that issue, Mr. Roper's first two questions are silent.

The third question on the Roper survey dealt with the influence perceived to result from private spending. Respondents were asked:

> As you may know, you can check off on your tax return that you want a dollar contributed to the presidential election campaign. In 1971 a law was passed that allows a presidential candidate to choose between receiving part of these funds for his campaign, and accepting no outside funds, or trying to raise more money from outside sources and not accepting any of these Federal funds. Suppose one candidate chose to receive these Federal funds, and the other decided to raise money from outside sources. Which candidate do you think would be *least* influenced by special interest groups—the one who got the Federal funds or the one who got the outside money, or don't you think there would be any difference.

(Emphasis in original). The plaintiffs believe the response to this question is significant. Forty-four percent of those polled said the candidate who got federal funds would be least influenced, while only 17 percent said the one who got outside money would be less influenced by special interest groups. Thirty percent said the source of funding would make no difference.

This question is similarly flawed, however, by its failure to distinguish between contributions and expenditures. It asks about the relative susceptibility to "special interest groups" of candidates accepting only federal funds and candidates "trying to raise

more money from outside sources and not accepting any of these Federal funds." The latter alternative could easily be construed by many respondents as asking about candidates seeking private contributions rather than independent expenditures. Indeed, if a political committee spent money that had been raised at the direction of the candidate, the political committee might run afoul of the coordinated expenditure ban already in FECA. Above all, the question does not deal with the problem involved in this case: political committees spending money on behalf of candidates who *have accepted* federal funds. The public might well believe these candidates to be less susceptible to the entreaties of special interest groups since they already have significant funding. We thus hold the evidence to be irrelevant and inadmissible. Fed. R. Evid. 401. As with the other poll results, because of its untimely submission, we also exclude it on grounds of prejudice. Fed. R. Evid. 403.

Roper then asked a question apparently relating to general support for the concept of public financing of presidential campaigns: "Which do you think is the fairer way to elect a president—by letting anyone contribute whatever they want to a candidate, or by limiting each candidate to the same number of dollars through federal financing?" Seventy-one percent of those polled thought the latter choice to be fairer. Twenty percent thought unlimited contributions were "fairer."

The public may think it fairer to all candidates to spend the same amount of money, but that belief is not relevant to whether they believe violation of section 9012(f) induces corruption. The evidence is thus not admitted.

The fifth question by the Roper organization at last makes the critical distinction between contributions

to candidates and independent expenditures on behalf of a presidential candidate. It reads as follows:

> Since 1971 nearly every presidential candidate has chosen to receive Federal funds rather than raise his money from outside sources. But in recent elections some private interest groups have spent very large sums of money on television advertising to support a particular candidate. Others say it is a purely technical way of getting around the 1971 law and should be stopped. Do you think it is all right or should it be stopped?

Sixty-five percent responded that the described practice should be stopped. Twenty-five percent thought it was "all right."

The finding that 65 percent of those polled believe independent expenditures "should be stopped" is suggestive. But it is also fatally incomplete. The poll does not follow up on the question and ask why those so responding believe independent expenditures should be stopped. They might have given reasons the Supreme Court has already held in *Buckley* and *Citizens Against Rent Control* to be insufficient. Only if the plaintiffs could show that a significant proportion of those polled believe independent expenditures should be stopped *because* they create the potential for corruption or do in fact lead to corruption would the response to the fifth question be relevant. Without that follow-up question, the results are worthless,[40] and the responses must be excluded as irrelevant.

[40] Even if plaintiffs had asked the suggested follow-up question, we would have two additional problems with reliance on the evidence, problems that independently compel us not to admit the results of this question into evidence. First, question five is leading and argumentative. It suggests that some technical evasion of "the law" is occurring and asks whether that evasion "should be stopped." The nature of the question renders the responses unreliable as indicators of true public attitudes. Second, the question fails to distinguish between coodinated expenditures and truly independent expenditures, the latter of which are the main focus of section 9012(f). Had the pollsters rephrased the second sentence of the question to read "But in recent elections some associations have spent large sums of money to spread their own views about the candidates by developing their own advertisements, without the help of the candidates, to support a particular candidate," the responses might have been more useful.

There are, of course, also complicated hearsay problems implicated by use of polling results. A poll is in many ways just a compilation of hearsay. The pollster recounts what each of his agents have told him that respondents have said. In some circumstances, however, the problems are not insuperable obstacles to admission of polling data. *See* Pittsburgh Press Club v. United States, 579 F.2d 751 (3d Cir. 1978). Because we do not believe the polling data survives a challenge under other provisions of the Federal Rules of Evidence, we do not reach the question whether it survives under the hearsay rule.

(ii) *Patronage Appointments*

The plaintiffs and amicus Common Cause also adduce evidence that individuals who spearheaded key political committees now hold positions of importance in the Reagan administration. We now review that evidence and its admissibility.

Plaintiffs note press reports of ambassadorships and cabinet positions going to those who were financially helpful to the Reagan campaign in 1980. The key "evidence" submitted on this point is a photocopy of an article in *The New Yorker* magazine by Elizabeth Drew. *See* Drew, *Politics and Money II, The*

New Yorker, Dec. 13, 1982. Drew quotes an anonymous Reagan campaign official as saying "The reason Ray Donovan is Secretary of Labor is that he was virtually the only heavy hitter in the Northeast who was raising money for Reagan between 1978 and 1980." *Id.* at 76. The hearsay rule bars the admissibility of this assertion as proof of the truth of the matter asserted. Fed. R. Evid. 801, 802. Indeed, because Ms. Drew was not called as a witness, it is double or triple hearsay not satisfying the requisites of Fed. R. Evid. 805, and includes the opinion of a person who has not been qualified to render an expert opinion on such a matter. Fed. R. Evid. 702.

Ms. Drew further opines that the current ambassadors to Great Britain and to Denmark gave sizeable contributions (not said to be illegal) to the Reagan campaign and to the Republican National Committee prior to their appointment. "Other ambassadorial appointments," the article continues, "went to men whose only credentials appeared to be that they had been financially helpful to the Reagan effort." *Id.* at 79. Obviously, these press reports are manifestly inadmissible for the truth of the matter asserted. Fed. R. Evid. 702, 801, 802. Their relevance to this litigation concerning independent expenditures is also questionable, since it is hardly clear on this record that these individuals were "helpful" through instigating political committee expenditures or through persuading people to make campaign contributions within the law.

The plaintiffs offer a stipulation that James Edwards, a member of the steering committee of a large political committee, the Americans For Change, was appointed Secretary of Energy. They also stipulate that Peter Flanigan, the chairman of the Americans

for an Effective Presidency, a conservative PAC, became a member of the President's Economic Policy Advisory Board in the Executive Office of the President. They assert that William Clements, who was involved in the organization of the Americans for an Effective Presidency, subsequently was named to the National Bipartisan Commission on Central America and the President's Commission on Strategic Forces; that Thomas Reed, Chairman of the Expenditures Committee of the Americans for an Effective Presidency, was made a National Security Council advisor, a Special Assistant to the President, and the Vice Chairman of the President's Commission on Strategic Forces; and that Anna Chennault, a member of another conservative PAC, Americans for Change, steering committee, was named Vice Chair of the President's Export Council in the Executive Office of the Presidency. Finally, they contend that Anthony R. Dolan, brother of NCPAC's chairman, was made a Special Assistant to the President and Chief Speechwriter. Although the defendants argue that this appointment was made on the basis of merit—Dolan is a Pulitzer Price winning author—they have stipulated to the truth of this allegation.

Most of this evidence is inadmissible because plaintiffs have provided no evidence of the appointments themselves. Even if we could take judicial notice of the appointments, however, we do not find the evidence adduced probative on the issue of corruption. Indeed, even if the plaintiffs had adduced evidence of some degree of significance on this point—they have not—we would be wary, for it is in the mainstream of American political tradition that a President appoints to high position persons with whom he is (ideologically) comfortable. Such persons have often sup-

ported the presidential candidacy financially. So long as the appointees are competent, and there is no evidence here that the challenged appointees are not, there is nothing even remotely resembling corruption involved.

(iii) *Briefings*

Finally, as evidence of at least the appearance of corruption, plaintiffs and amicus Common Cause cite "off the record" and confidential policy briefings being given by administration officials and cabinet officers to "major contributors" to NCPAC. Plaintiffs' evidence for this allegations comes from two photocopies of newspaper reports in a paper called "*The Sun*," presumably *The Baltimore Sun*. While the PAC defendants have stipulated to the authenticity of the photocopies, they have not stipulated to the truth of the matters asserted therein. Because these press reports are entirely hearsay, if not hearsay within hearsay that fails to satisfy Rule 805, we cannot admit them to show that these briefings in fact occurred.

The hearsay evidence rule does not bar, however, the admissibility of these and other authenticated news reports when used to show public perceptions of corruption, rather than corruption in fact. Two factors limit the probative value of the evidence, however. The cited reports have limited circulation. Moreover, the articles cited by plaintiffs do not suggest that the "confidential briefings" received by those contributing to or controlling political committees benefited them in any way other than to massage their egos or to supply them with war stories about "the day I went to the Commerce Department." There is no evidence that the defendant PACs represent any industry group that would benefit from special administration policies. We agree with the PAC defendants that this opportunity to "grip and grin" does not constitute corruption or the appearance of corruption.

(iv) *The Benefits of Independent Expenditures*

Thus far we have examined plaintiffs' evidence purporting to show the existence of "quo's" stemming from independent expenditures. Plaintiffs also offer evidence, however, relating to the existence of "quids," i.e., the benefits the presidential candidate receives from the conduct banned by section 9012(f).

The plaintiffs and amicus Common Cause attempt to show, for example, that the highly computerized NCPAC "carefully targeted its pro-Reagan radio, TV, and newspaper ads to 'crucial primary states' and major cities where Reagan needed NCPAC's help." Brief of Amicus Curiae Common Cause at 13-14.[48]

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[48] The plaintiffs cite a NCPAC "URGENTGRAM" requesting contributions to NCPAC because "Governor Reagan has almost reached his spending limit set by Federal Election Law." The URGENTGRAM continues,

> The Federal Election Law sets a limit on how much a campaign can spend. However, it sets no limit on how much individual citizens and organizations like NCPAC can spent on behalf of a candidate. As long as they are not connected to his official campaign.
>
> They call this "independent expenditures."
>
> This is exactly what the National Conservative Political Action Committee is going to do. Launch an "independent campaign to help Governor Reagan in the final round of primaries, as well as in the November elections."

Plaintiffs also cite stipulatons agreed to by the PAC defendants that FCM spent $60,000 on behalf of the Reagan campaign in New Hampshire after candidate Reagan had exhausted the amount he was permitted to spend under the law. They further proffer as exhibits fund raising materials of

They also cite newspaper reports that President Reagan liked NCPAC's television program "Ronald Reagan's America" so much that he telephoned NCPAC's Chairman to congratuate him." This evidence is inadmissible, however, to show the President's appreciation of NCPAC's activities or to show any beneficial effect of NCPAC's activities. Fed. R. Evid. 801, 802.

Again the hearsay rule does not prevent this evidence from being used to show a public perception of corruption. Rule 401's demand that evidence be relevant does pose a problem, however. The plaintiffs' evidence points only to the existence of a possible quid in primary elections. But section 9012(f) does not regulate independent expenditures in primary elections; its concern is the general election, about which plaintiffs have produced no evidence. Nonetheless, we suppose that readers might infer from the articles that, if independent expenditures could help in primary elections when the candidate ran short of funds, they could help in the general election too. The newspaper reports thus survive barely a Rule 401 challenge.[44]

FCM, which cite the need for money to help finance "independent expenditures" in critical primary states. They also offer as an exhibit the testimony of Robert C. Heckman, chairman of FCM, before the Federal Election Committee in which he states these fund raising materials were created because his organization perceived that certain states would be crucial to the Reagan candidacy.

[44] Plaintiffs and amicus Common Cause have not submitted any scholarly research tending to show a generally positive effect of independent expenditures on the prospects of the candidate they support. Such evidence might support adjudicative or other fact findings concerning the potential of independent expenditures to corrupt.

In sum, the evidence supporting an adjudicative finding of corruption or its appearance is evanescent. The polls were submitted too late and asked the wrong questions. The evidence of patronage appointments is largely inadmissible and inconclusive. The evidence of confidential briefings fails to arouse our sense of suspicion. And any adjudicative finding that independent expenditures can benefit presidential candidates in the general election would rest on the most speculative of inferences.

(c) *Adjudicative v. Legislative Facts*

Were the constitutionality of section 9012(f) to turn on the plaintiffs having proved in the normal way (i.e., by adducing evidence capable of supporting adjudicative findings of fact), the existence of corruption or the potential for corruption, we could return at most a "scotch verdict": not proven. Most of the evidence submitted by the plaintiffs is, as we have explained, inadmissible. That part which is admissible is only tangentially relevant and certainly insufficient. In constitutional litigation, however, appellate courts and courts of first instance have the ability to go beyond the formal rules of evidence and examine what may be described as "legislative facts."[45] In seeking to determine the rationality of a given measure in meeting permissible goals, the court may examine scholarly articles not formally

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[45] For further perspectives on the distinction between adjudicative fact finding and "legislative" fact finding, *see, e.g.*, Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 402-10 (1942); *see also* Carolene Prods. Co. v. United States, 323 U.S. 18, 28 n.13 (1944) (citing earlier authorities).

submitted or may guide its conclusions by reasonable exercise of its deductive powers. The Supreme Court's findings in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978), that the risk of corruption in ballot measure elections was minimal is a recent and apposite example of this process.[46] While this sort of "legislative factfinding" by a lower court is rightly subject to far stricter review on appeal than normal adjudicative factfinding, *see Fortin v. Darlington Little League*, 514 F.2d 344, 348-49 (1st Cir. 1975), it may nonetheless serve as the basis for the judgment of a trial court.

(i) *Potential for a Quo*

Reason does not support a conclusion that much of the conduct barred by section 9012(f), including the conduct of the PAC defendants here, would cause a reasonable person[47] to think that people or groups

[46] The psychological studies relied upon in Brown v. Board of Education, 347 U.S. 483, 494-95 (1964), provide another classic example of this process. *See also* Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (discussing abilities and roles of women on basis of contemporary understandings and scholarship).

[47] Absent relevant and admissible polling data or other scientific evidence that might alter our perception, we believe we should use a reasonable person standard in evaluating whether press reports can give rise to a belief that corruption exists. If we were to allow the charges of journalists automatically to create a presumption that corruption exists or that people believe corruption exists, a group of writers, no matter how unlikely the tales they tell, could rescue statutes otherwise abridging the free speech of those not employed by traditional, established media outlets. This cannot be the law.

were being rewarded because of their expenditures on behalf of a presidential candidate."

A president can give little of direct value to political committees, such as the defendants here, when those committees are detached from any organization with taxes to pay or a product or service to sell.[48] In his executive capacity, the president can suggest and help promulgate regulations with impact on businesses, but few of these will have any direct impact on political committees. The president can also use the moral and political power to influence members of Congress in their consideration of proposed legislation. Again, though, we see few ways in which the vast bulk of this legislation could affect political committees such as NCPAC and FCM. Additionally, even a president who contrived some way to assist ideological political committees in a way constituting corruption would face serious constraints: the president lives in a veritable goldfish bowl, and PAC expenditures are a matter of public record.

Notwithstanding these difficulties, the president, acting through subordinates, could influence regulations or legislation that might benefit businesses or labor organizations whose attached political committees had favored him with sizeable, effective expenditures in the past and whose future, similar efforts a first-term president might devoutly wish. Although

[48] We put aside the obvious fact, discussed *supra* part IV.C.3(b)(ii), that much of what a president does and proposes will reflect the shared ideology of the president and his financial supporters.

[49] It may also be worthwhile to observe that probably fifty percent of the independent expenditures made in a presidential campaign have almost no potential to corrupt. At least half the candidates lose the election and have no favors to bestow.

the generality with which such regulations or legislation usually are written would generally bring into play other interests that might constrain the power of the president, essentially private legislation or private regulation is not an unheard-of phenomenon. Nor do we deny that the president could, through patronage appointments, or by private legislation or regulations, financially benefit those controlling the ideological political committees whose vast expenditures in the past might have aroused a sense of obligation. While these favors might in fact be unbiased and perfectly proper responses to real needs, when preceded by expenditures of which the president is the third party beneficiary, they may sometimes assume an air of impropriety. Consequently, there is some possibility of a quo.

(ii) *Potential for a Quid*

It is indisputable that extremely large and professionally managed expenditures, especially ones that respond to those disclosures of campaign intelligence that seem inevitably to appear in the popular media, have the potential to benefit a presidential candidate. Such expenditures may complement the message sent by the candidate or reinforce it in areas where the candidate cannot afford to spend more. In short, the spending of these PAC defendants probably does exactly what they claim: help the man they support. That may be why so many give.[80]

[80] It is also possible, however, that expenditures by groups such as NCPAC whose ideology may be far from the moderate position to which most candidates ascribe, may produce "guilt by association" in the minds of moderate voters and hurt the candidate in whose name the expenditures are made. Indeed, it appears to have become a campaign strategy in some recent

Many expenditures made by political committees will, however, be used in amateurish fashion; they may produce an image contrary to that which the candidate hopes to project. Yet these feckless or harmful efforts are banned by section 9012(f)'s wholesale approach.

(d) *"Corruption to the Statute"*

The supporters of section 9012(f) have yet another theory to uphold the constitutionality of section 9012(f): "corruption to the statute."[81] Under this theory, section 9012(f) merely serves as a prophylactic measure capping two "loopholes" that might otherwise subvert the constitutionally permissible "broad goals" of the Fund Act and FECA. Section 9012(f) bars political committees from making any expenditures in excess of $1,000 without regard to whether those expenditures are truly coordinated. Consequently, section 9012(f) prevents political committees from making coordinated expenditures and then relying, in actions brought by the FEC under 2 U.S.C. § 441a, on the difficulty of proving coordination (particularly in the short time between expenditure and election) as a way of evading effective enforcement. Section 9012(f) also caps a possible loophole in the Fund Act in that it prevents privately raised money to overwhelm the public grant that, it is asserted, was intended "to serve as a substitute for,

elections to criticize candidates for receiving support from PACs.

[81] This term was first used by counsel for the FEC at oral argument. Tr. at 24. We believe it succinctly captures the essence of the arguments made.

not a supplement to, privately raised campaign funds." Brief of Amicus Curiae Common Cause at 58. These theories (and their implicit factual assumptions) are now examined.

As proof that section 9012(f) is needed to prevent coordinated expenditures, plaintiffs recite various events occurring during the 1980 election campaign. Plaintiffs lament that, despite a two and a half year investigation of these events by the FEC, that organization exercised its "prosecutorial discretion" not to pursue the matter further in light of the "substantial commitment of resources" that the requisite proceedings would entail.

Plaintiffs and amicus Common Cause attempt to show, for example, the existence of a "revolving door" between membership in the Reagan campaign and membership in key PACs supporting candidate Reagan.[49] They cite reports that members of the

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[49] The plaintiffs cite the following stipulations:

1. Stuart Spencer, who was involved in the organization of AEP [Americans for an Effective Presidency] and who was to run its operation, subsequently worked for the official Reagan campaign. He ran Reagan's campaigns for Governor of California in 1966 and 1970 and was the national political director for the official 1976 general election campaign for the Republican Party candidate.

2. William Clements, who was involved in the organization of AEP, served as the Chairman of the official Reagan compaign in Texas and is a member of the Republican National Committee Advisory Council on National Security and International Affairs.

3. [Former United States Senator] Harrison Schmitt, the Chairman of AFC [Americans for Change, a political committee] was, at the same time, a member of the Republican National Committee Advisory Council on Economic Affairs and a Reagan delegate to the 1980 Republican National Convention.

4. John Harmer, the Co-Chairman of AFC, was Ronald Reagan's former Lieutenant Governor.

5. Stan Huckaby, the Assistant Treasurer and Custodian of Records of AFC, was, at the same time, the Treasurer of the 1980 Republican Presidential Unity Committee, an authorized committee of Ronald Reagan, and had served as a paid consultant of the Republican National Committee. He maintained his office at the Republican National Committee headquarters.

6. James Edwards, a member of the AFC steering committee, was, at the same time, a member of the Republican National Committee Advisory Council on Natural Resources and a Reagan delegate to the 1980 Republican National Convention.

7. Anna Chennault, a member of the AFC steering committee, was, at the same time, a member of the Republican National Committee Advisory Committee on Fiscal Affairs, and an ex-officio member of the Republican National Committee Executive Committee.

Plaintiffs have offered press reports of other such instances of simultaneous or sequential membership in official Republican campaigns and conservative political action committees. These other reports are inadmissible as evidence, however. Fed. R. Evid. 801, 802.

Reagan campaign and the Republican National Committee deliberately leaked political intelligence, including critical polling data, to political action committees able to aid the campaign through "independent expenditures." These disclosures, it is said, were made to the media or other intermediaries, however, (rather than directly) to prevent charges of illegal coordination.[50] Plaintiffs cite leaders that supposedly

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[50] Unfortunately for the plaintiffs, all their evidence of such disclosures is inadmissible hearsay and thus cannot be relied

show that the independent expenditures of their organization are simply a way of evading the contribu-

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upon for proof of an adjudicative fact. Thus, we rule the following evidence inadmissible. Fed. R. Evid. 801, 802.

1. A quotation from an article in *The New Yorker*, *see supra* page 75, saying that Senator Jesse Helms, the Honorary Chairman of the National Conservative Club, a political action committee, stated:

> Well, as you may know, we have had an independent effort going on in North Carolina. The law forbids me to consult with him and it's been an awkward situation. I've had to, sort of, talk indirectly with Paul Laxalt [Mr. Reagan's campaign manager] and hope that he would pass along, uh, and I think the messages have gotten through all right.

Even if Ms. Drew's account in her *New Yorker* article could be relied upon as evidence of what Ms. Drew would say if called as a witness, *see* Fed. R. Evid. 803(24), it cannot be taken as evidence of what Mr. Helms really said.

2. A press report, again taken from *The New Yorker* article that Lyn Nofziger, a former Assistant to the President for Political Affairs, and a Reagan campaign official in 1980, in describing how the head of an independent committee in 1980 could have found out how to aid the Reagan campaign in 1980, said:

> I wouldn't have to talk to Bill Casey [Reagan's 1980 campaign director]. I'd have a friend of mine talk to Bill Casey. I wouldn't have any problem getting that done. There's no way in the world that if I'm running an independent campaign I'm not going to get the information I need, or Dick Wirthlin's [a Reagan pollster] data or talk to the chairman of the Republican National Committee, or whatever.

Again, this is inadmissible hearsay, if not inadmissible double hearsay.

3. A statement by Paul Dietrich, a former officer of defendant FCM, that "If I really want a poll from the

tion limits contained in section 9012(a) of the Fund Act."[a]

Finally, they cite evidence that the PAC defendants and the official Reagan campaign used the same suppliers and service organizations. It is stipulated for example, that "[t]he Reagan for President Committee and the Reagan/Bush Committee as well as NCPAC and FCM employed many of the same vendors. The Reagan for President Committee employed these vendors to assist in the 1980 presidential campaign[.] while NCPAC and FCM used many of the same vendors while making independent expenditures

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Republic National Committee or a campaign, I can get it. They'll leak it to me." Since this comes from the *New Yorker* article, it is inadmissible hearsay, even as a report of what Mr. Dietrich said, unless it is admissible under Fed. R. Evid. 803(24), the foundation for which has not been laid. Nor is it admissible under Fed. R. Evid. 801(d)(2)(D), because the plaintiffs have not established that the statement was made by an agent of defendant FCM "within the scope of his agency or employment [and] made during the existence of the relationship."

[a] Plaintiffs' evidence here suffers few hearsay problems. The fund raising literature contained in the exhibits is replete with reminders that, while the official campaign is limited by federal regulations in what it can spend, "independent" expenditures are helpful and still permitted. Nonetheless, we must exclude as inadmissible hearsay the following quotation of Mr. Dietrich taken from the *New Yorker* article.

> All the independent PAC's . . . have a little dance [where] we dance around the law in a way that never breaks the letter but breaks the spirit of the law—but we don't agree with the law anyway.

This quotation is inadmissible as evidence of Mr. Dietrich's attitude toward the election laws or of whether section 9012(f) in fact could serve to prevent subversion of sections 9012(a) and 9012(b).

on behalf of Ronald Reagan for president during the 1980 election." Specifically, it is stipulated that Arthur J. Finkelstein and Associates consulted and polled for both the official Reagan campaign and NCPAC. Mr. Finkelstein himself, it is agreed, was a director of NCPAC in 1979. It is also stipulated that Mediamerica, Inc., a media production and advertising firm, provided services to the official Reagan campaign and for NCPAC during overlapping periods in 1980. John T. Dolan, the head of NCPAC, and Maiselle Shortley, his sister, are stipulated to have been directors of Mediamerica. Other ties between NCPAC and Mediamerica are alleged, but are based on inadmissible hearsay.

Despite all of this evidence, however, the FEC after a lengthy investigation apparently found itself unable even to advocate a prosecution against these PACs for making illegal coordinated expenditures. But even the clearest imaginable evidence of coordination, coupled with admission that the FEC was not enforcing the ban on coordinated expenditures, would have only a minimal effect on our analysis of section 9012(f). The constitutionality of that provision does not stand or fall on whether it aids enforcement of constitutional provisions of the FECA or Fund Act—drawing and quartering their violators would accomplish that goal too. Rather, the issue is whether section 9012(f) prevents enough corruption of government or sufficiently prevents the appearance of corruption that it justifies the abridgements of free speech entailed thereby. While the ability of section 9012(f) to stop otherwise-undetectable corruption via coordinated expenditures[55] may have

[55] It is almost tautological to state that undetectable coordinated expenditure cannot create an appearance of corruption. We suppose, however, that the difference between legal standards of proof and popular understandings might create a situation where some unprosecuted coordination created an appearance of corruption.

some relevance to our analysis, it is not dispositive. "Corruption to the statute" is a theory of conditional legitimacy; it is legitimate only insofar as it relates to corruption of government.

The second prong of the "corruption to the statute" argument—the assertion that section 9012(f) prevents private money from swamping the public grant—suffers even more seriously from the only-conditional legitimacy of that theory. The argument implicitly abstracts a "Purpose of the Fund Act"—predominant public funding—from the text of selected provisions and legislative debate, and concludes that, because section 9012(f) furthers that grand constitutional purpose, the provision must be constitutional too.[56]

[56] Excerpts from Common Cause's amicus brief may reveal these implicit arguments.

> Congress enacted the Fund Act and activated it in 1973 as a means of combatting the corrosive effect of private money on the Nation's highest elected office.
>
> . . . .
>
> The legislative history fully reflects this purpose.
>
> . . . .
>
> Without section 9012(f)(1), the Fund Act would fall short of achieving these compelling congressional goals.
>
> . . . .
>
> Congress intended public financing to serve as a substitute for, and not a supplement to, privately raised campaign funds. Invalidating section 9012(f)(1) would defeat the congressional purpose by allowing millions of

The fact, however, that certain purposes of Congress may, in their abstract sense, suffice to overcome otherwise existing restrictions on power, and the fact that certain statutes passed as part of a legislative scheme fairly carry out that legitimate purpose does not mean that all statutes either supposedly carrying out that purpose or supposedly an-

---

dollars in privately raised contributions to swamp the public grant.

. . . .

The invalidation of section 9012(f)(1) would undercut the basic function of the Fund Act and revive the evils the Fund Act was intended to eliminate.

Brief of Amicus Curiae Common Cause at 52-58.

The same sort of argument is also used by the Federal Election Commission.

The overall purpose of the Fund Act was "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fund-raising. *See* S. Rep. No. 93-689, pp. 1-10 (1974)." Buckley v. Valeo, 424 U.S. at 91. . . . The Supreme Court found that "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest . . . and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates of the rigors of soliciting private contributions." 424 U.S. at 96.

Congress clearly believes section 9012(f) necessary to the success of the legislative scheme for public financing of presidential elections. To implement a system in which a candidate for president can forego private contributions and accept public financing, Congress considered controls on the expenditures of political committees necessary.

Federal Election Commission's Opening Brief on the Merits, at 5-8.

cillary to legitimate enactments are themselves legitimate. Each provision must be judged on its own.

4. *Possible Narrowing Constructions*

Because of potential overbreadth problems with section 9012(f), we asked the litigants to suggest methods to narrow the scope of the statute. If the method for narrowing did not seriously depart from Congressional intent or create independent constitutional problems such as vagueness, it might render the remaining parts of the statute not substantially overbroad. Two theories emerged.

(a) *Control*

Counsel for the Democrats suggested that any overbreadth problem the court might find with the statute could be cured by refining the definition of "political committee" contained in the Fund Act. Only if the contributors to a group did not have control over how their money was spent would an association that expends money on behalf of a presidential candidate be considered a political committee.[87] Counsel suggested that this narrowing construction might cure any defects in section 9012(f) because the provision would then bar only "proxy" speech by individuals and speech by corporations, both of which counsel asserted to be less protected by the first amendment than the ordinary political speech of individuals.

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[87] His precise words were as follows: "The distinction that we would urge upon the Court is to define a political committee as used in 9012(f) to mean a group that solicits, collects contributions and that the contributors do not have control over how that money is spent." Tr. at 82.

We have three problems with this suggestion. First, there is absolutely no evidence in the legislative history that Congress intended to so limit the definition of a political committee. While we suppose we can impute to Congress a general intent not to write unconstitutional laws, and, under that theory or fiction excise anything from the statute that might otherwise render it unconstitutionally overbroad, at some point in our effort to save Congressional enactments, we do violence to its intent by leaving the nation with grossly truncated statutes that Congress might never have wanted to pass in the first place.[88]

The second problem with the "control test" proposed by the Democrats is that, even if it could be reconciled with Congressional intent, and even if it cured any overbreadth problems that might exist with the statute, the test creates a constitutional problem of its own: it leaves the statute unconstitutionally vague. *See* L. Tribe *American Constitutional Law* §§ 12-26, 12-29 (1978). We can think of no definition of "control"—certainly not one advanced by counsel[89]—that would give fair warning to the in-

[88] Indeed, this theory taken to its extreme would destroy the overbreadth doctrine itself. The courts would just cut the laws back to the point at which they were constitutional.

[89] The following colloquy may reveal the difficulty in formulating a concrete definition of "control."

> JUDGE GILES: What do you mean by control?
>
> MR. FEIRSON: Control is a say in how the money is going to be spent. They have some say, some control over how the money is to be spent. Obviously each contributor could not have total control, but as the situation now stands with the particular defendants that are before the Court, people simply contribute the money and they have no control, they have no say over how the money is to be spent.
>
> JUDGE GILES: What do you mean by how the money is to be spent? They have to say ["]we authorize the money to be spent in New Hampshire, Tennessee or Alabama?["]
>
> MR. FEIRSON: They have no say over who—which candidates are to be supported, they have no say over what the distribution is going to be, let alone over the day-to-day operating or the day-to-day minutia[e] of how the money is to be spent.
>
> JUDGE GILES: Well, suppose you have a PAC that is organized for purposes of expending monies on behalf of a particular candidate and the solicitation was very simple: You know who X is, what he stands for; we need your money to support that person. He is running for national office.
>
> MR. FEIRSON: I still think that would fall within the prohibition of 9012(f).
>
> JUDGE GILES: So, what would you advocate as the control that an individual contributor would have to have over the monies in order to escape the snare of 9012(f)?
>
> MR. FEIRSON: I think they have to have a say in how the money is actually spent, and I will acknowledge to the Court that the natural result of that will be that you cannot have a group of 10,000 people who will not fall within the prohibition of 9012(f).

Tr. at 86-88.

dividual hoping to engage in political speech of when he was subjecting himself to a jail term.[90] As the

[90] If the FEC could draft rules clarifying the meaning of "control," vagueness problems might be reduced. Unfortunately, the FEC may have no rule making power in this area since its proposed regulations are subject to a congressional veto, a procedure that the Supreme Court has recently held unconstitutional. *See* INS v. Chadha, 103 S. Ct. 2764 (1983); Process Gas Consumers Group v. Consumers Energy Council of America, 103 S. Ct. 3356. Indeed, the PAC defendants have argued that, because the Fund Act contains a legislative

American Civil Liberties Union has written in its amicus brief:

> [The control] "standard" fails to specify where, on the continuum between a multi-million dollar media campaign funded by a nationwide committee with thousands of adherents and a political pamphlet drafted and funded jointly by a handful of like-minded neighbors, individual adherents yield enough "control" to others so that the group becomes subject to section 9012(f)'s criminal penalties. Thus, the wholly amorphous, undefinable line between "informal groups" and "political committees" previously espoused by the FEC lacks the precision and clarity required by both the First and Fifth Amendments.

Finally, even if these vagueness problems could be cured, we doubt that the proposed narrowing would excise enough of the defective portion of section 9012(f) to render the remainder not substantially overbroad. An ideological organization that solicited funds from the public but did not tell it the precise message it intended to disseminate would still be criminally liable under section 9012(f), even if the amount spent was modest and the organization was unattached to any business enterprise that might later benefit by a quo from the candidate after his election.[40]

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veto provision in 26 U.S.C. § 9009(c), section 9012(f) is unconstitutional. Although we have very serious doubts about this argument, *see* Chadha, 103 S. Ct. at 2775, we decline to address it in view of our disposition of this case.

[40] Counsel for the defendants has aptly captured the problem with the control theory.

[Footnote continued on page 91a]

(b) *Advisory Opinions*

Amicus Common Cause suggested at oral argument that the ability and obligation of the FEC to issue advisory opinions concerning the Fund Act under 2 U.S.C. § 437f ameliorates any overbreadth problems with section 9012(f). They cite (accurately) *Martin Tractor Co. v. FEC*, 627 F.2d 375, 386 (D.C. Cir. 1980), for the proposition that, where an advisory opinion mechanism exists "to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted, the chill induced by facial vagueness or overbreadth is *pro tanto* reduced." (Footnote omitted). *But cf. Buckley v. Valeo*, 424 U.S. 1, 40 n.47 (1976) (advisory opinions cannot cure problems where available only to some or limited number of individuals

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[40] [Continued]

> MR. SPARKS: . . . I don't see how you can narrow the statute.
>
> And, Judge Giles, I will tell the Court what else I don't see. I don't see the bright line.
>
> We started out with some people sitting around in your living room awhile ago, Judge, and it now appears that each of them has to keep control of his money, and under one Commission advisory opinion, each of them has to go down to the "Philadelphia Inquirer" to pay for the ad. If they hire a professional, they are a political committee. Heaven forbid they hire Mr. Finkelstein [who also worked for NCPAC], about whom we have heard so much.
>
> Over and over, the question is, where is the bright line, and over and over the answer comes back "control," but it can't be defined. Even if it could, even if it could be, your Honors, to be consistent, to be consistent with everything that they have pled so far in this case, control won't save it.

Tr. at 101-02.

and where agency not required to issue them except within a reasonable time).

If section 9012(f) indeed suffered from vagueness, Common Cause would have a strong point. But the statute is quite clear. All expenditures over $1,000 by political committees are illegal, with certain limited exceptions spelled out in section 9012 (f)(2). The problem with section 9012(f), as we shall presently see, is that it is overbroad. And, contrary to the cited dictum from the District of Columbia Circuit's *Martin Tractor* opinion, we do not believe advisory opinions are likely to cure overbreadth. Where the statute clearly prohibits the desired speech, those desiring to participate in the political process may well believe that seeking an advisory opinion is a useless gesture, for if the agency ruled in their favor, it would be violating its Congressional mandate to enforce the law, not to rewrite it.

Our view is confirmed by the FEC's broad interpretation of section 9012(f). The FEC has held an individual to be a political committee where that person collected money to pay for jointly purchased political advertisements. Advisory Opinion 1980-26, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577. It has held a group that intended to purchase an advertisement in the *New York Times* endorsing an unidentified alternative candidate to President Carter to be a political committee. Advisory Opinion 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5247. And it has labeled as a political committee a group that discussed foreign policy and might deliver $1,000 to a favored candidate. While these advisory rulings may be perfectly proper under the statute, they suggest section 437f is not a fruitful source for a narrowing thereof.

In short, the suggested narrowing constructions of section 9012(f) do not cure its overbreadth problem. The "control" approach fails to perceive the major problem with the statute and introduces serious vagueness problems. The advisory opinion mechanism, while suitable for curing vagueness, is an inappropriate tool for alleviating overbreadth.

D. *The Overbreadth Analysis*

Under the first amendment overbreadth doctrine, courts may strike down legislation as facially unconstitutional even where a more narrowly drafted statute, one that more precisely "articulated its burdens in terms of specific harms sought to be avoided," might legitimately proscribe some subset of the conduct or speech barred by the challenged legislation. *See* Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 854 (1970).[*] Where this subset of legitimately proscribable conduct or speech becomes infinitesimally small, overbreadth reaches its polar case and its method of analysis collapses into more traditional methods of facially invalidating a statute.

Section 9012(f) is a good candidate for a declaration of polar overbreadth. There has been scant evidence (much less compelling evidence adduced on this record) of even the appearance of corruption as might counter the first amendment protection to which speech by individuals, acting through the useful device of a political committee, is entitled. Based on logic and experience, and as revealed by the fore-

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[*] Often, this doctrine enables those whose conduct might have been legitimately proscribed by the more narrowly drafted statute nonetheless to challenge the more broadly drafted legislation.

going discussion, we have determined by way of "legislative" findings (and not adjudicative findings) that modest expenditures by political committees that are not affiliated with a business or labor organization have almost no potential to corrupt or to create the appearance of corruption in the minds of reasonable persons. As the amount expended increases, however, well beyond $1,000, and as the expenditures are increasingly subject to expert, professional guidance, the potential for benefit to the candidate increases. Still, so long as the political committees are organized for purely ideological purposes, the president can do little to reciprocate in a manner that might fairly be called corruption.

There is, however, a sufficient, though narrow, area of concern to prompt us to proceed by way of overbreadth analysis: when large expenditures are made by political committees that are affiliated with business or labor groups there is some potential of the appearance of corruption. The benefits possibly resulting from such expenditures create a sufficient motive for actions capable of being interpreted as corrupt, and, despite the scrutiny to which the president is subject, a limited opportunity exists to take such actions.

The question before us now is whether such conduct, fairly seen as creating the appearance of corruption, constitutes so significant a part of that prohibited by section 9012(f) that the defects of that statute in barring non-threatening (and constitutionally protected) speech may be repaired on a case-by-case basis as the statute is applied or whether the judiciary must remedy the risk to the Republic by recalling the statute altogether.

Were we to focus only on that conduct that has occurred while section 9012(f) has been in force,

plaintiffs would have a better (though still very weak) case that the statute is not unconstitutionally overbroad. Uncontroverted and admissible evidence shows that 70 percent of the independent expenditures made in the 1980 campaign were by political committees whose aggregate expenditures exceeded $1,000,000.[40] These large expenditures, we have acknowledged, have the greatest potential to benefit the candidate and, under some circumstances, to lay the

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[40] There were some difficulties with the data on this narrow point. The parties have not provided us with information that would enable us to determine precisely what percentage of independent expenditures made by political committees in the 1980 campaigns on behalf of candidates for president or vice president (as opposed to expenditures on behalf of candidates for other federal offices) were made by political committees spending more than one million dollars. There is good reason to suspect, however, that compilation of such figures would not materially advance (and indeed might hinder) plaintiffs' cause. The parties' stipulations show that the 1980 election saw $13.7 million spent on independent expenditures on behalf of presidential and vice presidential candidates. They also show that NCPAC thus spent $2.0 million and that FCM thus spent about $2.06 million. Even assuming that the Congressional Club, another political committee, spent all of its $4.6 million on behalf of presidential candidates and that Americans for an Effective Presidency, another political committee, did likewise in spending all of its 1.27 million, only 72% of the independent expenditures made on behalf of presidential candidates were made by political committees that expended more than one million dollars. This figure could increase to as much as 85%, however, if it were assumed that all of the $1.9 million in independent expenditures made by individuals or other groups (not political committees) were made on behalf of presidential and vice presidential candidates, and if this $1.9 million was thus subtracted from the $13.7 million spent overall in such races. For the reasons set forth in the text, however, these details are not particularly relevant.

foundation for at least the appearance of corruption. But whether spending creates an appearance of corruption depends not only on the amount spent but also on the identity of the spender. Even large expenditures made by political committees not attached to any business or union create little appearance of corruption since there is little the president can do to benefit such committees financially. And in 1980, admissible and uncontroverted evidence shows that an overwhelming proportion of the independent expenditures made in the presidential and vice presidential campaigns came from organizations like the PAC defendants here, organizations not formally affiliated with any business or labor group and thus scarcely capable of being financially benefitted by presidential favors. Thus, taking this last factor into account, even looking just at the conduct that has occurred, we would grant judgment for the defendants.

We believe, however, that considering only conduct that has actually occurred and determining what proportion of that conduct Congress could legitimately prohibit misses the entire point of overbreadth analysis. The first amendment overbreadth doctrine "is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.' *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 634 . . .; *Gooding v. Wilson*, 405 U.S. 518, 521 . . . (1972)." *New York v. Ferber*, 102 S. Ct. 3348, 3361 (1982). Consequently, in judging whether a statute abridging first amendment freedoms is unconstitutionally overbroad, the court

must not make its decision on the basis of what conduct has occurred since the statute's enactment, rather it must consider what conduct would have occurred if the statute did not exist. Having undertaken this admittedly difficult process, the court should then consider what proportion of that conduct the Congress could legitimately prohibit.[*] If Congress could not constitutionally prohibit a substantial proportion of that conduct, the statute must fall.

Under the method of analysis we believe appropriate in first amendment overbreadth cases, section 9012(f) must fall. Almost all of the conduct it prohibits is protected by the first amendment. The statute bars several friends from associating, drafting an advertisement supporting the election of a major presidential candidate for reasons of their own, and then soliciting funds from other persons to help pay for the ad. There is little potential for corruption stemming from such conduct, yet the statute prohibits it. Similarly, the statute bars larger organizations from expressing their own reasons for endorsing or denouncing a presidential candidate—reasons that the major parties may think it more politic not to bring up. So long as the expenditures are not mammoth in relation to the money already available to the candidate—the parties agree that in 1984 some $40 million will be given to the publicly funded candidates—and so long as the organization is detached from any organization with an independent economic existence, there is little danger of corruption. Yet the statute bars this conduct as well.

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[*] Our belief that we should not focus exclusively on the events that have occurred does not allow us, of course, to strike down a statute on the basis of remote contingencies. *See Ferber*, 102 S. Ct. at 3348. Nonetheless, we believe reasonable and informed speculation is permissible.

Nor can it be argued that without section 9012(f) we would see more of the type of expenditures to be feared most—those by political committees attached to businesses and unions. 2 U.S.C. § 441b(b)(4), the constitutionality of which has already been upheld in the *NRWC* case, already thwarts any such threat to our polity. That provision bars corporate political committees from soliciting contributions from persons other than its stockholders, executive and administrative personnel. It also bars union political committees from collecting sums other than from current union members. But few of these individuals are likely to contribute vast sums to corporate or union political committees. Even a stockholder or union member who believed that an independent expenditure by his corporation (or union) might benefit him financially would likely not contribute much since the political committee could make almost the same expenditure without his marginal aid. Putting aside this free rider problem, the small stockholder's interest in the financial well being of the corporation (and the union member's interest in the financial well being of the union) is generally so small that even a small contribution—say on the order of $50—would not likely produce a presidential favor so large that it would benefit him financially. As for executive and other officers (or large stockholders), their number is generally so small that the $5,000 limit on individual contributions prevents them from providing a source of large sums of money to the political committees of their corporations or unions. In sum, section 9012(f) deters protected speech without potential to corrupt and is largely unnecessary to prevent protected speech conceivably capable of creating the appearance of corruption.

V. CONCLUSION

The defendants in these actions have identified the critical vice of section 9012(f): were it not repugnant to the Constitution, it would give the institutionalized political parties an almost impervious monopoly over the agenda and terms of debate in presidential electoral campaigns. Were we to give our blessing to the law examined in these actions, we would be permitting only those few with control over our major political parties, our institutional press,[48] or with vast individual resources, to capture the economies of scale inherent in our national society and thus to be heard above the din of everyday existence. Where the threat of corruption is so minimal, we cannot so abnegate our responsibilities.

Having concluded that section 9012(f) of title 26 of the United States Code abridges speech and association protected by the first amendment, and that section 9012(f) is substantially overbroad, and having failed to find a permissible narrowing construction to cure the overbreadth, we can reach but one conclusion. Plaintiffs in these two actions are not entitled to a declaration that section 9012(f) is not unconstitutional on its face. Our judgment must be for the defendants.[49]

An appropriate order follows.

/s/ Edward R. Becker
EDWARD R. BECKER, J.

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[48] *See supra* page 46 & note 35.

[49] Our disposition with respect to the facial constitutionality of section 9012(f) forecloses the possibility of our granting other relief sought by the FEC in its action: a declaratory judgment that section 9012(f) could be constitutionally applied to the PAC defendants in these cases. Defendants have not filed a counterclaim asking that the statute be declared unconstitutional. Consequently, we issue no such declaration.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-2329

DEMOCRATIC PARTY OF THE UNITED STATES, and EDWARD MEZVINSKY, PLAINTIFFS

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., DEFENDANTS

and

FEDERAL ELECTION COMMISSION, INTERVENOR

Civil Action No. 83-2823

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., DEFENDANTS

ORDER

BECKER, *Circuit Judge.* December 12, 1983

AND NOW, this 12th day of December, in consideration of the foregoing opinion, it is ORDERED

that judgment be, and it hereby is, entered for the defendants.

BY THE COURT:

/s/ Edward R. Becker
EDWARD R. BECKER
Circuit Judge
Sitting by Designation

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-2823

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., DEFENDANTS

Civil Action No. 83-2329

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL., PLAINTIFFS

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., DEFENDANTS

and

FEDERAL ELECTION COMMISSION, INTERVENOR

Consolidated Three-Judge Court

NOTICE OF APPEAL

Notice is hereby given that plaintiff Federal Election Commission appeals to the Supreme Court of the United States, pursuant to 26 U.S.C. § 9011(b) and

28 U.S.C. § 2101, from the final order entered in this action on December 12, 1983.

Respectfully submitted,

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Dated: December 15, 1983

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-2923

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

NATIONAL CONSERVATIVE POLITICAL ACTION
COMMITTEE, ET AL., DEFENDANTS

Civil Action No. 83-2329

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.,
PLAINTIFFS

v.

NATIONAL CONSERVATIVE POLITICAL ACTION
COMMITTEE, ET AL., DEFENDANTS

and

FEDERAL ELECTION COMMISSION, INTERVENOR

Consolidated Three-Judge Court

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Notice of Appeal by first-class mail, postage pre-paid, on the following counsel:

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December 15, 1983

APPENDIX D

TITLE 26: INTERNAL REVENUE CODE

Chapter 95—Presidential Election Campaign Fund

§ 9001. Short title

This chapter may be cited as the "Presidential Election Campaign Fund Act."

§ 9002. Definitions

For purposes of this chapter—

(1) The term "authorized committee" means, with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. Such authorization shall be addressed to the chairman of such political committee, and a copy of such authorization shall be filed by such candidates with the Commission. Any withdrawal of any authorization shall also be in writing and shall be addressed and filed in the same manner as the authorization.

(2) The term "candidate" means with respect to any presidential election, an individual who—

(A) has been nominated for election to the office of President of the United States or to the office of Vice President of the United States by a major party, or

(B) has qualified to have his name on the election ballot (or to have the names of electors pledged to him on the election bal-

lot) as the candidate of a political party for election to either such office in 10 or more States.

For purposes of paragraphs (6) and (7) of this section and purposes of section 9004(a)(2), the term "candidate" means, with respect to any preceding presidential election, an individual who received popular votes for the office of President in such election. The term "candidate" shall not include any individual who has ceased actively to seek election to the office of President of the United States or to the office of Vice President of the United States, in more than one State.

(3) The term "Commission" means the Federal Election Commission established by section 309(a)(1) of the Federal Election Campaign Act of 1971 [section 437c(a)(1) of title 2].

(4) The term "eligible candidates" means the candidates of a political party for President and Vice President of the United States who have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003.

(5) The term "fund" means the Presidential Election Campaign Fund established by section 9006(a).

(6) The term "major party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 25 percent or more of the total number of popular votes received by all candidates for such office.

(7) The term "minor party" means, with respect to any presidential election, a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office.

(8) The term "new party" means with respect to any presidential election, a political party which is neither a major party nor a minor party.

(9) The term "political committee" means any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

(10) The term "presidential election" means the election of presidential and vice-presidential electors.

(11) The term "qualified campaign expense" means an expense—

(A) incurred—

(i) by the candidate of a political party for the office of President to further his election to such office or to further the election of the candidate of such political party for the office of Vice President, or both,

(ii) by the candidate of a political party for the office of Vice President to further his election to such of-

fice or to further the election of the candidate of such political party for the office of President, or both, or

(iii) by an authorized committee of the candidates of a political party for the offices of President and Vice President to further the election of either or both of such candidates to such offices,

(B) incurred within the expenditure report period (as defined in paragraph (12)), or incurred before the beginning of such period to the extent such expense is for property, services, or facilities used during such period, and

(C) neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which such expense is incurred or paid.

An expense shall be considered as incurred by a candidate or an authorized committee if it is incurred by a person authorized by such candidate or such committee, as the case may be, to incur such expense on behalf of such candidate or such committee. If an authorized committee of the candidates of a political party for President and Vice President of the United States also incurs expenses to further the election of one or more other individuals to Federal, State, or local elective public office, expenses incurred by such committee which are not specifically to further the election of such other individual or individuals shall be considered as incurred to further the election of such candidates for President and

Vice President in such proportion as the Commission prescribes by rules or regulations.

(12) The term "expenditure report period" with respect to any presidential election means—

(A) in the case of a major party, the period beginning with the first day of September before the election, or, if earlier, with the date on which such major party at its national convention nominated its candidate for election to the office of President of the United States, and ending 30 days after the date of the presidential election; and

(B) in the case of a party which is not a major party, the same period as the expenditure report period of the major party which has the shortest expenditure report period for such presidential election under subparagraph (A).

§ 9003. Condition for eligibility for payments

(a) *In general.* In order to be eligible to receive any payments under section 9006, the candidates of a political party in a presidential election shall, in writing—

(1) agree to obtain and furnish to the Commission such evidence as it may request of the qualified campaign expenses of such candidates,

(2) agree to keep and furnish to the Commission such records, books, and other information as it may request, and

(3) agree to an audit and examination by the Commission under section 9007 and to pay any amounts required to be paid under such section.

(b) *Major parties.* In order to be eligible to receive any payments under section 9006, the candidates of a major party in a presidential election shall certify to the Commission, under penalty of perjury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which they will be entitled under section 9004, and

(2) no contributions to defray qualified campaign expenses have been or will be accepted by such candidates or any of their authorized committees except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(c), and no contributions to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002(11) have been or will be accepted by such candidates or any of their authorized committees.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

(c) *Minor and new parties.* In order to be eligible to receive any payments under section 9006, the candidates of a minor or new party in a presidential election shall certify to the Commission under penalty of perjury, that—

(1) such candidates and their authorized committees will not incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004, and

(2) such candidates and their authorized committees will accept and expend or retain contributions to defray qualified campaign expenses only to the extent that the qualified campaign expenses incurred by such candidates and their authorized committees certified to under paragraph (1) exceed the aggregate payments received by such candidates out of the fund pursuant to section 9006.

Such certification shall be made within such time prior to the day of the presidential election as the Commission shall prescribe by rules or regulations.

(d) *Withdrawal by candidate.* In any case in which an individual ceases to be a candidate as a result of the operation of the last sentence of section 9002(2), such individual—

(1) shall no longer be eligible to receive any payments under section 9006, except that such individual shall be eligible to receive payments under such section to defray qualified campaign expenses incurred while actively seeking election to the office of President of the United States or to the office of Vice President of the United States in more than one State; and

(2) shall pay to the Secretary, as soon as practicable after the date upon which such individual ceases to be a candidate, an amount equal to the amount of payments received by such individual under section 9006 which are not used to defray qualified campaign expenses.

§ 9004. Entitlement of eligible candidates to payments

(a) *In general.* Subject to the provisions of this chapter—

(1) The eligible candidates of each major party in a presidential election shall be entitled to equal payments under section 9006 in an amount which, in the aggregate, shall not exceed the expenditure limitations applicable to such candidates under section 441a(b)(1)(B) of title 2.

(2) (A) The eligible candidates of a minor party in a presidential election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the major parties in the preceding presidential election.

(B) If the candidate of one or more political parties (not including a major party) for the office of President was a candidate for such office in the preceding presidential election and received 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office, such candidate and his running mate for the office of Vice President, upon compliance with the provisions of section 9003(a) and (c), shall be treated as eligible candidates entitled to payments under section 9006 in an amount computed as provided in subparagraph (A) by taking into account all the popular votes received by such candidate for the office of

President in the preceding presidential election. If eligible candidates of a minor party are entitled to payments under this subparagraph, such entitlement shall be reduced by the amount of the entitlement allowed under subparagraph (A).

(3) The eligible candidates of a minor party or a new party in a presidential election whose candidate for President in such election receives, as such candidate, 5 percent or more of the total number of popular votes cast for the office of President in such election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by such candidate in such election bears to the average number of popular votes received in such election by the candidates for President of the major parties. In the case of eligible candidates entitled to payments under paragraph (2), the amount allowable under this paragraph shall be limited to the amount, if any, by which the entitlement under the preceding sentence exceeds the amount of the entitlement under paragraph (2).

(b) *Limitations.* The aggregate payments to which the eligible candidates of a political party shall be entitled under subsections (a)(2) and (3) with respect to a presidential election shall not exceed an amount equal to the lower of—

(1) the amount of qualified campaign expenses incurred by such eligible candidates and their authorized committees, reduced by the

amount of contributions to defray qualified campaign expenses received and expended or retained by such eligible candidates and such committees, or

(2) the aggregate payments to which the eligible candidates of a major party are entitled under subsection (a)(1), reduced by the amount of contributions described in paragraph (1) of this subsection.

(c) *Restrictions.* The eligible candidates of a political party shall be entitled to payments under subsection (a) only—

(1) to defray qualified campaign expenses incurred by such eligible candidates or their authorized committees, or

(2) to repay loans the proceeds of which were used to defray such qualified campaign expenses, or otherwise to restore funds (other than contributions to defray qualified campaign expenses received and expended by such candidates or such committees) used to defray such qualified campaign expenses.

(d) *Expenditures from personal funds.* In order to be eligible to receive any payment under section 9006, the candidate of a major, minor, or new party in an election for the office of President shall certify to the Commission, under penalty of perjury, that such candidate will not knowingly make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaign for election to the office of President in excess of, in the aggregate, $50,000. For purposes of this subsection, expenditures from personal funds made by a candidate of a major, minor, or new party for the office of Vice President shall be considered to be ex-

penditures by the candidate of such party for the office of President.

(e) *Definition of immediate family.* For purposes of subsection (d), the term "immediate family" means a candidate's spouse, and any child, parent, grandparent, brother, half-brother, sister, or half-sister of the candidate, and the spouses of such persons.

§ 9005. Certification by Commission

(a) *Initial certifications.* Not later than 10 days after the candidates of a political party for President and Vice President of the United States have met all applicable conditions for eligibility to receive payments under this chapter set forth in section 9003, the Commission shall certify to the Secretary of the Treasury for payment to such eligible candidates under section 9006 payment in full of amounts to which such candidates are entitled under section 9004.

(b) *Finality of certifications and determinations.* Initial certifications by the Commission under subsection (a), and all determinations made by it under this chapter, shall be final and conclusive, except to the extent that they are subject to examination and audit by the Commission under section 9007 and judicial review under section 9011.

§ 9006. Payments to eligible candidates

(a) *Establishment of campaign fund.* There is hereby established on the books of the Treasury of the United States a special fund to be known as the "Presidential Election Campaign Fund." The Secretary of the Treasury shall, from time to time, transfer to the fund an amount not in excess of the sum of the

amounts designated (subsequent to the previous Presidential election) to the fund by individuals under section 6096. There is appropriated to the fund for each fiscal year, out of amounts in the general fund of the Treasury not otherwise appropriated, an amount equal to the amounts so designated during each fiscal year, which shall remain available to the fund without fiscal year limitation.

(b) *Payments from the fund.* Upon receipt of a certification from the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary of the Treasury shall pay to such candidates out of the fund the amount certified by the Commission. Amounts paid to any such candidates shall be under the control of such candidates.

(c) *Insufficient amounts in fund.* If at the time of a certification by the Commission under section 9005 for payment to the eligible candidates of a political party, the Secretary determines that the moneys in the fund are not, or may not be, sufficient to satisfy the full entitlements of the eligible candidates of all political parties, he shall withhold from such payment such amount as he determines to be necessary to assure that the eligible candidates of each political party will receive their pro rata share of their full entitlement. Amounts withheld by reason of the preceding sentence shall be paid when the Secretary determines that there are sufficient moneys in the fund to pay such amounts, or portions thereof, to all eligible candidates from whom amounts have been withheld, but, if there are not sufficient moneys in the fund to satisfy the full entitlement of the eligible candidates of all political parties, the amounts so withheld shall be paid in such manner that the eligible candidates of each political party receive

their pro rata share of their full entitlement. In any case in which the Secretary determines that there are insufficient moneys in the fund to make payments under subsection (b), section 9008(b)(3), and section 9037(b), moneys shall not be made available from any other source for the purpose of making such payments.

§ 9007. Examinations and audits; repayments

(a) *Examinations and audits.* After each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party for President and Vice President.

(b) *Repayments.*

(1) If the Commission determines that any portion of the payments made to the eligible candidates of a political party under section 9006 was in excess of the aggregate payments to which candidates were entitled under section 9004, it shall so notify such candidates, and such candidates shall pay to the Secretary of the Treasury an amount equal to such portion.

(2) If the Commission determines that the eligible candidates of a political party and their authorized committees incurred qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party were entitled under section 9004, it shall notify such candidates of the amount of such excess and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(3) If the Commission determines that the eligible candidates of a major party or any authorized committee of such candidates accepted contributions (other than contributions to make up deficiencies in payments out of the fund on account of the application of section 9006(c)) to defray qualified campaign expenses (other than qualified campaign expenses with respect to which payment is required under paragraph (2)), it shall notify such candidates of the amount of the contributions so accepted, and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(4) If the Commission determines that any amount of any payment made to the eligible candidates of a political party under section 9006 was used for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made, or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used to defray such qualified campaign expenses,

it shall notify such candidates of the amount so used, and such candidates shall pay to the Secretary of the Treasury an amount equal to such amount.

(5) No payment shall be required from the eligible candidates of a political party under this subsection to the extent that such payment, when added to other payments required from such

candidates under this subsection, exceeds the amount of payments received by such candidates under section 9006.

(c) *Notification.* No notification shall be made by the Commission under subsection (b) with respect to a presidential election more than 3 years after the day of such election.

(d) *Deposit of repayments.* All payments received by the Secretary of the Treasury under subsection (b) shall be deposited by him in the general fund of the Treasury.

§ 9008. Payments for presidential nominating conventions

(a) *Establishment of accounts.* The Secretary shall maintain in the fund, in addition to any account which he maintains under section 9006(a), a separate account for the national committee of each major party and minor party. The Secretary shall deposit in each such account an amount equal to the amount which each such committee may receive under subsection (b). Such deposits shall be drawn from amounts designated by individuals under section 6096 and shall be made before any transfer is made to any account for any eligible candidate under section 9006(a).

(b) *Entitlement to payments from the fund.*

(1) *Major parties.* Subject to the provisions of this section, the national committee of a major party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed $3,000,000.

(2) *Minor parties.* Subject to the provisions of this section, the national committee of a minor party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts which, in the aggregate, shall not exceed an amount which bears the same ratio to the amount the national committee of a major party is entitled to receive under paragraph (1) as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the United States of the major parties in the preceding presidential election.

(3) *Payments.* Upon receipt of certification from the Commission under subsection (g), the Secretary shall make payments from the appropriate account maintained under subsection (a) to the national committee of a major party or minor party which elects to receive its entitlement under this subsection. Such payments shall be available for use by such committee in accordance with the provisions of subsection (c).

(4) *Limitation.* Payments to the national committee of a major party or minor party under this subsection, from the account designated for such committee shall be limited to the amounts in such account at the time of payment.

(5) *Adjustment of entitlements.* The entitlements established by this subsection shall be adjusted in the same manner as expenditure limitations established by section 441a(b) and section 441(a)(d) of title 2, United States Code,

are adjusted pursuant to the provisions of section 441a(c) of such title.

(c) *Use of funds.* No part of any payment made under subsection (b) shall be used to defray the expenses of any candidate or delegate who is participating in any presidential nominating convention. Such payments shall be used only—

(1) to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) by or on behalf of the national committee receiving such payments; or

(2) to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds (other than contributions to defray such expenses received by such committee) used to defray such expenses.

(d) *Limitation of expenditures.*

(1) *Major parties.* Except as provided by paragraph (3), the national committee of a major party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of payments to which such committee is entitled under subsection (b)(1).

(2) *Minor parties.* Except as provided by paragraph (3), the national committee of a minor party may not make expenditures with respect to a presidential nominating convention which, in the aggregate, exceed the amount of the entitlement of the national committee of a major party under subsection (b)(1).

(3) *Exception.* The Commission may authorize the national committee of a major party

or minor party to make expenditures which, in the aggregate, exceed the limitation established by paragraph (1) or paragraph (2) of this subsection. Such authorization shall be based upon a determination by the Commission that, due to extraordinary and unforeseen circumstances, such expenditures are necessary to assure the effective operation of the presidential nominating convention by such committee.

(4) *Provision of legal or accounting services.* For purposes of this section, the payment, by any person other than the national committee of a political party (unless the person paying for such services is a person other than the regular employer of the individual rendering such services) of compensation to any individual for legal or accounting services rendered to or on behalf of the national committee of a political party shall not be treated as an expenditure made by or on behalf of such committee with respect to its limitations on presidential nominating convention expenses.

(e) *Availability of payments.* The national committee of a major party or minor party may receive payments under subsection (b)(3) beginning on July 1 of the calendar year immediately preceding the calendar year in which a presidential nominating convention of the political party involved is held.

(f) *Transfer to the fund.* If, after the close of a presidential nominating convention and after the national committee of the political party involved has been paid the amount which it is entitled to receive under this section, there are moneys remaining in

the account of such national committee, the Secretary shall transfer the moneys so remaining to the fund.

(g) *Certification by Commission.* Any major party or minor party may file a statement with the Commission in such form and manner and at such times as it may require, designating the national committee of such party. Such statement shall include the information required by section 433(b) of title 2, together with such additional information as the Commission may require. Upon receipt of a statement filed under the preceding sentence, the Commission promptly shall verify such statement according to such procedures and criteria as it may establish and shall certify to the Secretary for payment in full to any such committee of amounts to which such committee may be entitled under subsection (b). Such certifications shall be subject to an examination and audit which the Commission shall conduct no later than December 31 of the calendar year in which the presidential nominating convention involved is held.

(h) *Repayments.* The Commission shall have the same authority to require repayments from the national committee of a major party or a minor party as it has with respect to repayments from any eligible candidate under section 9007(b). The provisions of section 9007(c) and section 9007(d) shall apply with respect to any repayment required by the Commission under this subsection.

§ 9009. Reports to Congress; regulations

(a) *Reports.* The Commission shall, as soon as practicable after each presidential election, submit a full report to the Senate and House of Representatives setting forth—

(1) the qualified campaign expenses (shown in such detail as the Commission determines necessary) incurred by the candidates of each political party and their authorized committees;

(2) the amounts certified by it under section 9005 for payment to the eligible candidates of each political party;

(3) the amount of payments, if any, required from such candidates under section 9007, and the reasons for each payment required;

(4) the expenses incurred by the national committee of a major party or minor party with respect to a presidential nominating convention;

(5) the amounts certified by it under section 9008(g) for payment to such committee; and

(6) the amount of payments, if any, required from such committees under section 9008 (b), and the reasons for such payment.

Each report submitted pursuant to this section shall be printed as a Senate document.

(b) *Regulations, etc.* The Commission is authorized to prescribe such rules and regulations in accordance with the provisions of subsection (c), to conduct such examinations and audits (in addition to the examinations and audits required by section 9007 (a)), to conduct such investigations, and to require the keeping and submission of such books, records, and information, as it deems necessary to carry out the functions and duties imposed on it by this chapter.

(c) *Review of regulations.*

(1) The Commission, before prescribing any rule or regulation under subsection (b), shall transmit a statement with respect to such rule or regulation to the Senate and to the House

of Representatives, in accordance with the provisions of this subsection. Such statement shall set forth the proposed rule or regulation and shall contain a detailed explanation and justification of such rule or regulation.

(2) If either such House does not, through appropriate action, disapprove the proposed rule or regulation set forth in such statement no later than 30 legislative days after receipt of such statement, then the Commission may prescribe such rule or regulation. Whenever a committee of the House of Representatives reports any resolution relating to any such rule or regulation, it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to. The Commission may not prescribe any rule or regulation which is disapproved by either such House under this paragraph.

(3) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(4) For purposes of this subsection, the term "rule or regulation" means a provision or series of interrelated provisions stating a single separable rule of law.

§ 9010. Participation by Commission in judicial proceedings

(a) *Appearance by counsel.* The Commission is authorized to appear in and defend against any

action filed under section 9011, either by attorneys employed in its office or by counsel whom it may appoint without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title.

(b) *Recovery of certain payments.* The Commission is authorized through attorneys and counsel described in subsection (a) to appear in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary of the Treasury as a result of examination and audit made pursuant to section 9007.

(c) *Declaratory and injunctive relief.* The Commission is authorized through attorneys and counsel described in subsection (a) to petition the courts of the United States for declaratory or injunctive relief concerning any civil matter covered by the provisions of this subtitle or section 6096. Upon application of the Commission an action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

(d) *Appeal.* The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions

in which it appears pursuant to the authority provided in this section.

§ 9011. Judicial review

(a) *Review of certification, determination, or other action by the Commission.* Any certification, determination, or other action by the Commission made or taken pursuant to the provisions of this chapter shall be subject to review by the United States Court of Appeals for the District of Columbia upon petition filed in such Court by any interested person. Any petition filed pursuant to this section shall be filed within thirty days after the certification, determination, or other action by the Commission for which review is sought.

(b) *Suits to implement chapter.*

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provisions of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United

States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

§ 9012. Criminal penalties

(a) *Excess Expenses.*

(1) It shall be unlawful for an eligible candidate of a political party for President and Vice President in a presidential election or any of his authorized committees knowingly and willfully to incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under section 9004 with respect to such election. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to incur expenses with respect to a presidential nominating convention in excess of the expenditure limitation applicable with respect to such committee under section 9008(d), unless the incurring of such expenses is authorized by the Commission under section 9008(d)(3).

(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(b) *Contributions.*

(1) It shall be unlawful for an eligible candidate of a major party in a presidential election or any of his authorized committees knowingly and willfully to accept any contribution to defray qualified campaign expenses, except to the extent necessary to make up any deficiency in payments received out of the fund on account of the application of section 9006(c), or to defray expenses which would be qualified campaign expenses but for subparagraph (C) of section 9002(11).

(2) It shall be unlawful for an eligible candidate of a political party (other than a major party) in a presidential election or any of his authorized committees knowingly and willfully to accept and expend or retain contributions to defray qualified campaign expenses in an amount which exceeds the qualified campaign expenses incurred with respect to such election by such eligible candidate and his authorized committees.

(3) Any person who violates paragraph (1) or (2) shall be fined not more than $5,000, or imprisoned not more than one year, or both. In the case of a violation by an authorized committee, any officer or member of such committee who knowingly and willfully consents to such violation shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(c) *Unlawful use of payments.*

(1) It shall be unlawful for any person who receives any payment under section 9006, or to whom any portion of any payment received under such section is transferred, knowingly and willfully to use, or authorize the use of such

payment or such portion for any purpose other than—

(A) to defray the qualified campaign expenses with respect to which such payment was made, or

(B) to repay loans the proceeds of which were used, or otherwise to restore funds (other than contributions to defray qualified campaign expenses which were received and expended) which were used, to defray such qualified campaign expenses.

(2) It shall be unlawful for the national committee of a major party or minor party which receives any payment under section 9008 (b)(3) to use, or authorize the use of, such payment for any purpose other than a purpose authorized by section 9008(c).

(3) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(d) *False statements, etc.*

(1) It shall be unlawful for any person knowingly and willfully—

(A) to furnish any false, fictitious, or fraudulent evidence, books, or information to the Commission under this subtitle, or to include in any evidence, books, or information so furnished any misrepresentation of a material fact, or to falsify or conceal any evidence, books, or information relevant to a certification by the Commission or an examination and audit by the Commission under this chapter; or

(B) to fail to furnish to the Commission any records, books, or information requested by it for purposes of this chapter.

(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(e) *Kickbacks and illegal payments.*

(1) It shall be unlawful for any person knowingly and willfully to give or accept any kickback or any illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees. It shall be unlawful for the national committee of a major party or minor party knowingly and willfully to give or accept any kickback or any illegal payment in connection with any expense incurred by such committee with respect to a presidential nominating convention.

(2) Any person who violates paragraph (1) shall be fined not more than $10,000, or imprisoned not more than five years, or both.

(3) In addition to the penalty provided by paragraph (2), any person who accepts any kickback or illegal payment in connection with any qualified campaign expense of eligible candidates or their authorized committees, or in connection with any expense incurred by the national committee of a major party or minor party with respect to a presidential nominating convention shall pay to the Secretary of the Treasury, for deposit in the general fund of the Treasury, an amount equal to 125 percent of the kickback or payment received.

(f) *Unauthorized expenditures and contributions.*

(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to—

(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions, or

(B) expenditures by any organization described in section 501(c) of this title which is exempt from tax under section 501 (a) of this title in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(g) *Unauthorized disclosure of information.*

(1) It shall be unlawful for any individual to disclose any information obtained under the provisions of this chapter except as may be required by law.

(2) Any person who violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

§ 9013. **Effective date of chapter**

The provisions of this chapter shall take effect on January 1, 1973.

APPENDIX E

FEDERAL ELECTION CAMPAIGN ACT OF 1971, AS AMENDED, TITLE 2

• • • •

2 U.S.C. 437c. Federal Election Commission

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(b) *Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.*

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

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§ 437d. Powers of the Commission

(a) *Specific authorities.* The Commission has the power—

(1) to require by special or general orders, any person to submit, under oath, such written reports and answers to questions as the Commission may prescribe;

(2) to administer oaths or affirmations;

(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3);

(5) to pay witnesses the same fees and mileage as are paid in like circumstances in the courts of the United States;

(6) to initiate (through civil actions for injunctive, declaratory, or other appropriate relief), defend (in the case of any civil action brought under section 437g(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel;

(7) to render advisory opinions under section 437f of this title;

(8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, United States Code, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

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(e) *Exclusive civil remedy for enforcement.* Except as provided in section 437g(a)(8) of this title, the power of the Commission to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act.

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§ 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis

of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph 4(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act

or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that

a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in

which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint

filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business

days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c (b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

AMICUS CURIAE

BRIEF

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ALEXANDER L. STEVAS
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Nos. 83-1032 and 83-1122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION,
Appellant,
v.
NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,
Appellees.

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.,
Appellants,
v.
NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF AMICUS CURIAE COMMON CAUSE

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IN THE

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Appellant,

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DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.,
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Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF AMICUS CURIAE COMMON CAUSE

Common Cause, which has the consent of all parties to participate as an *amicus curiae*, submits this brief urging the Court to note probable jurisdiction of these appeals.[1]

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[1] Appellant Federal Election Commission (the Commission) filed its Jurisdictional Statement on December 22, 1983. Appellant Democratic Party filed its Jurisdictional Statement on January 6, 1984. On February 22, 1984, the Court requested appellees to respond to the Jurisdictional Statements by filing a motion to dismiss or affirm on or before March 23, 1984. *See* letter dated February 22, 1984, from Alexander L. Stevas to Robert R. Sparks, Jr.,

INTEREST OF THE AMICUS CURIAE

Common Cause is a nonprofit, nonpartisan membership corporation organized under the laws of the District of Columbia. It has approximately 250,000 members. Common Cause filed briefs and participated in oral argument as an *amicus curiae* before the three-judge district court below.[2] It also participated actively in Congressional consideration of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"), the statute at issue in this case.

Common Cause has appeared before this Court in other cases concerning the constitutionality or implementation of the federal election laws, including *Common Cause v. Schmitt*, a case involving issues similar to those presented here with respect to the applicability and constitutionality of 26 U.S.C. § 9012(f)(1).[3]

JURISDICTION

Jurisdiction over this appeal is conferred by three statutory provisions: 26 U.S.C. § 9010(c);[4] 26 U.S.C.

Esq. *Amicus curiae* Common Cause files this brief pursuant to Supreme Court Rule 36.1. Letters evidencing the parties' consent to the participation of Common Cause as *amicus curiae* have been filed with the Clerk of the Court.

[2] *See Democratic Party v. National Conservative Political Action Committee*, Nos. 83-2329, 83-2823, slip op. at 12 n.5 (E.D. Pa. Dec. 12, 1983) (three-judge court).

[3] 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by equally divided Court*, 455 U.S. 129 (1982) (as plaintiff); *see, e.g., California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) (as *amicus curiae*); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (as intervening defendant); *Republican National Committee v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980) (as *amicus curiae*).

[4] 26 U.S.C. § 9010(c) authorizes the Commission to petition a three-judge district court "for declaratory or injunctive relief concerning any civil matter covered by the provisions of [the Fund Act]." The statute provides that "[a]ny appeal [from the decision of the three-judge court] shall lie to the Supreme Court."

§ 9011(b);[5] and 28 U.S.C. § 1252.[6] Appellants have complied with all applicable procedural requirements under each of these statutes and under the Rules of this Court. Hence, this appeal is properly before this Court.

ARGUMENT

I. THIS CASE WARRANTS PLENARY REVIEW.

The decision below struck down an Act of Congress—26 U.S.C. § 9012(f)(1), a key provision of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013. Adjudicating the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform."[7]

Only once in its 200-year history has this Court summarily affirmed a lower court decision striking down a federal statute.[8] The extraordinary step of summary disposition would certainly be inappropriate here.

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[5] 26 U.S.C. § 9011(b) authorizes the Commission, the national committee of any political party and individuals eligible to vote to institute actions before a three-judge district court "to implement or construe any provision of [the Fund Act]." Any appeal of such actions "shall lie to the Supreme Court."

[6] 28 U.S.C. § 1252 authorizes any party to appeal to the Supreme Court from any judgment, decree or order "holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or any of its agencies . . . is a party."

[7] *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927); *see Rescue Army v. Municipal Court*, 331 U.S. 549, 569 (1947) (adjudicating the constitutionality of a federal statute is "the most important and the most delicate of the Court's functions"); *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring).

[8] In *Railroad Retirement Bd. v. Kalina*, 431 U.S. 909 (1977), the Court summarily affirmed a decision of the Sixth Circuit that a requirement in the Railroad Retirement Act of 1937 that husbands but not wives of retired employees prove dependency in order to qualify for spouse's annuity violated the due process clause of the Fifth Amendment.

Section 9012(f)(1) limits to $1,000 the amount a "political committee" can spend on behalf of a presidential candidate who has voluntarily opted to finance his general election campaign with public, rather than private, funds. Section 9012(f)(1) is an integral part of Congress' scheme for public financing of presidential elections—a scheme that "furthers, not abridges, pertinent First Amendment values."[9] This Court has twice upheld that statutory scheme against constitutional challenge.[10]

This case presents an important and unsettled question of constitutional law: whether Congress, in the context of a public financing scheme, may place reasonable limits on the candidate-related expenditures of "political committees" in order to preserve the integrity and appearance of integrity of presidential elections. This Court has previously determined that this question warrants plenary review. *See Common Cause v. Schmitt*, 425 U.S. 129 (1982).[11] This case also presents an important issue concerning the proper application of the "overbreadth" doctrine in First Amendment adjudication.[12]

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[9] *Buckley*, 424 U.S. at 92-93 (1976).

[10] *Id.* at 90-104; *Republican National Committee v. FEC*, *supra*.

[11] In *Common Cause v. Schmitt*, this Court affirmed by an equally divided vote the decision of a three-judge district court in the District of Columbia holding that Section 9012(f)(1) violated the First Amendment. The Court's 4-to-4 affirmance was not a decision on the merits and carries no precedential weight. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73 (1977); *Neil v. Biggers*, 409 U.S. 188, 192 (1972); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 269 (1960); *United States v. Pink*, 315 U.S. 203, 216 (1942).

[12] Appellant Federal Election Commission also seeks review of the district court's holding that private parties may file suit under 26 U.S.C. § 9011(b) to "implement or construe" the Fund Act. Common Cause believes this issue was correctly decided below.

II. THE COURT BELOW ERRED IN INVALIDATING SECTION 9012(f)(1).

Under this Court's precedents, Section 9012(f)(1) does not violate the First Amendment and should not have been invalidated as facially overbroad. In striking down Section 9012(f)(1), the district court committed several legal errors.

First, the decision below cannot be reconciled with this Court's unanimous decision last term in *FEC v. National Right to Work Committee*, ("NRWC"), 103 S. Ct. 552 (1982).[13] That decision sustained the constitutionality of 2 U.S.C. § 441(b), which prohibits all expenditures and all contributions by corporations, labor unions and national banks in connection with all federal elections. The district court here failed to accord any deference whatsoever to Congress' expert judgment in the electoral area, despite this Court's clear admonition in *NRWC* that courts should not "second guess a legislative determination . . . where corruption is the evil feared."[14] The district court ignored entirely the judgment of Congress and substituted its own highly speculative assessment of the effects of political committee expenditures. The court conceded that its assessment was based not on the "legislative facts" before Congress or the "adjudicative facts" adduced by the parties, but on its own "experience."[15]

Second, the district court ignored the extensive *stipulated* factual record compiled by the parties, in disregard of this Court's repeated admonition that constitutional adjudication "should rest on an adequate and full-bodied

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[13] The decision below is inconsistent also with the unanimous decision of the en banc Eleventh Circuit in *Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (per curiam), *appeal filed*, 52 U.S.L.W. 3575 (Jan. 20, 1984), as to which a Jurisdictional Statement is pending.

[14] 103 S. Ct. at 560.

[15] Slip op. at 100-01.

[factual] record." [16] The court here grounded its decision on "virtually no adjudicative facts." [17]

The district court's rejection of the stipulated record evidence led it to rest its constitutional analysis on several clearly erroneous factual "findings." For example, the court concluded that the expenditures made by the defendant political committees were "amplified individual speech presumptively entitled to full constitutional protection." [18] The stipulated evidence, however, demonstrated that contributors to the defendant committees do not control how the committees spend their money, what candidates the committees support or oppose, or what the committees say about those candidates.

Similarly, the court asserted—again without any record support—that many expenditures by political committees will "be used in an amateurish fashion [and] may produce an image contrary to that which the candidate hopes to project." [19] In fact, the record demonstrated precisely the opposite: the defendant committees (and similar committees that operated in the 1980 presidential election) are run by experienced professionals who successfully target the committees' expenditures to provide maximum assistance to a publicly funded presidential candidate's official campaign.

Third, the district court erroneously assumed that only the existence or likelihood of illicit *financial* gain could

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[16] *Public Affairs Association v. Rickover*, 369 U.S. 111, 113 (1962) (per curiam), *quoted in H.L. v. Matheson*, 450 U.S. 398, 414 n.25 (1981) (Powell, J., concurring); *see United States v. Automobile Workers*, 352 U.S. 567, 591 (1957) (referring to "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision").

[17] Slip op. at 36; *see id.* at 75-81 (dismissing stipulated factual evidence).

[18] *Id.* at 56.

[19] *Id.* at 85.

justify a Congressional limitation on campaign-related spending by political committees.[20] But that assumption is at odds with this Court's determination in *Buckley* and *NRWC* that Congress can constitutionally seek to eliminate *all* forms of *quid pro quo* (or the appearance thereof) in federal elections.[21] As *Buckley* makes clear, it is not exclusively the presence of an *economic* motive that creates the potential for corruption, or the appearance thereof; it is, rather, the broader danger that a successful candidate will be unduly influenced by or beholden to large financial benefactors, to the detriment of his responsibility to the electorate.

Fourth, the district court misapplied the First Amendment overbreadth doctrine in striking down Section 9012 (f) (1). The district court found that Section 9012(f) (1) did in fact prevent corruption and the appearance thereof,[22] but nevertheless struck down the statute as facially overbroad. In doing so, the district court failed to heed this Court's warning in *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), that invalidation of a statute on overbreadth grounds is "strong medicine" to be applied "sparingly and only as a last resort." [23] The district

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[20] *See id.* at 103 ("Even large expenditures made by political committees not attached to any business or union create little appearance of corruption *since there is little the president can do to benefit such committees financially.*") (emphasis supplied); *id.* at 101 ("so long as the political committees are organized for purely ideological purposes, the president can do little to reciprocate in a manner that might fairly be called corruption").

[21] *See Buckley*, 424 U.S. at 26-27 ("To the extent that large contributions are given to secure a *political quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined") (emphasis supplied); *NRWC*, 103 S. Ct. at 555 (1982) (discussing ideological purpose of National Right to Work Committee).

[22] *See* slip op. at 9, 84-85.

[23] *See New York v. Ferber*, 458 U.S. 747 (1982); *H.L. v. Matheson*, 450 U.S. 398, 405-06 (1981) (plaintiff whose conduct was legiti-

court's doubts as to the statute's constitutionality related to the potential applicability of the statute in hypothetical situations as to which there was no record evidence. And its conclusion that Section 9012(f)(1) is substantially overbroad was based on its erroneous legal assumption that Congress is permitted to regulate the campaign activities only of organizations "with an independent economic existence."[24] That assumption—and the overbreadth ruling that it engendered—obviously cannot be squared with *NRWC* or other decisions of the Court.

CONCLUSION

For these reasons, we urge the Court to note probable jurisdiction of these appeals and to establish an expedited briefing schedule, *see* 26 U.S.C. § 9011(b)(2), that will permit the Court to hear and decide this case during the current term, prior to the commencement of the 1984 presidential general election campaign.

Respectfully submitted,

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March 15, 1984

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mately regulated by abortion notification statute lacked standing to raise overbreadth challenge); *NRWC*, 103 S. Ct. at 560-61 (rejecting overbreadth challenge to restrictions on corporate and union political activities).

[24] Slip op. at 105.

MOTION

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On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM OR DISMISS

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March 23, 1984

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QUESTION PRESENTED

Whether, after this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), Congress may constitutionally limit independent expenditures by political committees in support of a candidate for President of the United States who has chosen to accept public funding during the general election campaign.

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* Appellees, National Conservative Political Action Committee and Fund for a Conservative Majority are nonstock corporations. Neither corporate appellee has any affiliate, parent or subsidiary company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1032

FEDERAL ELECTION COMMISSION,
Appellant,
v.
NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE,
and
FUND FOR A CONSERVATIVE MAJORITY,
Appellees.

No. 83-1122

DEMOCRATIC PARTY OF THE UNITED STATES, *et al.*,
Appellants,
v.
NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE,
and
FUND FOR A CONSERVATIVE MAJORITY,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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MOTION TO AFFIRM OR DISMISS

Appellees, National Conservative Political Action Committee ("NCPAC") and Fund for a Conservative Majority ("FCM"), move the Court to affirm the judgment of the three-judge district court below on the ground that the questions on which that court's decision depend have been decided by this Court and require no further briefing

or argument. In *Common Cause v. Schmitt*, 512 F.Supp. 489 (D.D.C. 1980) a three-judge district court for the District of Columbia, citing this Court's clear pronouncements in *Buckley v. Valeo*, 424 U.S. 1 (1976), struck down as unconstitutional on its face the same statutory provision at issue in these appeals. After full briefing and argument, this Court summarily affirmed that decision, 4-4, with Justice O'Connor not participating. 455 U.S. 129 (1982). Now, another three-judge court, this time in the Eastern District of Pennsylvania, has done the same thing, again following the command of *Buckley*.

This Court's decision in *Buckley* was carefully crafted to permit Congress to regulate the conduct of elections, without unnecessarily crowding the First Amendment freedoms of a candidate's supporters—the voters. *Buckley* has been cited and followed by courts, high and low, in their review of this nation's election laws. We believe this Court meant what it said in *Buckley*: except to prevent the appearance or reality of corruption, expenditure limitations are constitutionally impermissible, and *independent* expenditures do not corrupt. 424 U.S. at 47. The Court should say so again and put an end to what by now has become the quadrennial litigation over section 9012(f). These appeals do not present a substantial federal question that this Court has not already answered. For that reason, they should be dismissed.

STATEMENT OF THE CASE

A. The Statute At Issue

Section 9012(f) is a part of the Presidential Election Campaign Fund Act of 1971 ("the Fund Act"), which provides for public financing of presidential general election campaigns as a voluntary alternative to private fundraising by candidates. Candidates who accept public financing must pledge that neither they nor their authorized committees will incur campaign expenses in excess of the amount of public funds received, and that they will not accept private contributions to defray such expenses. 26 U.S.C. § 9003(b).[1] That is the core of the Fund Act; most of the remaining provisions of the Act deal with procedures for receipt of and accounting for expenditure of the funds received, and related "housekeeping" items.

But not all of the other provisions of the Fund Act are so benign. The statute at issue in these appeals, 26 U.S.C. § 9012(f), regulates expenditures by political committees[2] which are unaffiliated with, and completely independent of, authorized committees of a Presidential or Vice Presidential candidate. Section 9012(f) makes criminal the expenditure of more than $1,000 by an independent political committee to further the election of such a candidate, who has chosen to receive public funding. Any officer or member of an independent political committee who violates section 9012(f) is subject to a fine of not more than $5,000, or one year imprisonment, or both; and the committee itself may be fined a like amount. 26 U.S.C. § 9012(f)(3).

Section 9012(f)(2)(A) and (B) exempt from the operation of section 9012(f) expenditures by broadcasters or by periodical publications in reporting the news or in taking editorial positions, and expenditures by tax-exempt organizations in communicating to its members the views of that organization.

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[1] The Fund Act's restrictions on private contributions apply only to the general election. There is no similar restriction on contributions during the primary election period. Indeed, the amount of the public grant to a candidate at the primary election stage depends in part on the size and number of private contributions to that candidate. 26 U.S.C. § 9034.

[2] A political committee is defined in the Fund Act as "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination of election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. § 9002(9).

B. Appellees

Appellees FCM and NCPAC are multicandidate political committees,[5] organized in 1972 and 1975, respectively. Both are registered with the Federal Election Commission ("FEC") pursuant to 2 U.S.C. § 433. To the extent permitted by law, appellees receive contributions from donors and make direct contributions to candidates for federal and state office. Appellees also engage in independent expenditures (defined at 2 U.S.C. § 431(17)) for and against such candidates and, in 1980, raised and independently spent several million dollars for advertisements which advocated the election of Ronald Reagan as President of the United States. Mr. Reagan accepted public financing of his 1980 campaign.

Both appellees have announced publicly their intention to engage in independent expenditures in support of Mr. Reagan in 1984. It is not known whether Mr. Reagan will elect to receive public funding of his 1984 re-election campaign.

Appellees do not coordinate their activities with each other, or with other conservative groups. In fact, they are competitors, competing for funds from the same general universe of potential contributors. Each group seeks to distinguish itself in the eyes of those potential contributors in order to retain those donors, and to attract more.

Both NCPAC and FCM are subject to section 9012(f).

C. The Proceedings Below

Appellees accept the recitation of the proceedings below as set forth in the Jurisdictional Statement of the Federal Election Commission ("FEC J.S.") at 4-6.

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[5] A multicandidate political committee is defined as "a political committee which has been registered under [2 U.S.C. § 433] . . . for a period of not less than 6 months, which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office." 2 U.S.C. § 441a(a)(4).

SUMMARY OF ARGUMENT

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court established two propositions which are dispositive of these appeals: (1) expenditures for the purpose of furthering the election of a candidate for federal office are political speech protected by the First Amendment; (2) when those expenditures are independent of, and not coordinated with, a candidate's campaign, there is no compelling governmental interest sufficient to justify the regulation of such expenditures. Since *Buckley*, those propositions have been reaffirmed in *Republican National Committee* v. *Federal Election Commission*, 487 F.Supp. 280 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2nd Cir.) (*en banc per curiam*) *aff'd summarily*, 445 U.S. 955 (1980). That case held that limits on expenditures coordinated with a publicly-funded candidate are permissible, but only because the candidate's supporters have available to them other ways to express their support of the candidate: they are free to make unlimited independent expenditures. Appellants disagree with these propositions of law and have sought to relitigate *Buckley*, *Republican National Committee* and this Court's affirmance of *Common Cause* v. *Schmitt*, 512 F.Supp. 489 (D.D.C. 1980), *aff'd by an equally divided court*, 455 U.S. 129 (1982).

Appellants do not like the holding of *Buckley* and tried below to argue around it, contending that section 9012(f) somehow safeguards the integrity of the Fund Act; that it ensures equality of spending between publicly-financed candidates; and that these cases are not like *Buckley* because section 9012(f) restricts expenditures only by political committees, but not others. This Court considered and rejected each of these arguments in *Buckley* in striking down a provision almost identical to that at issue here.

ARGUMENT

I. THIS COURT'S DECISION IN BUCKLEY CONTROLS THE OUTCOME OF THESE APPEALS

A. The Holding of Buckley

In *Buckley*, this Court drew a constitutional distinction between political contributions and expenditures. Limitations on contributions were constitutionally sanctioned; similar limitations on expenditures were not. The Court held that contribution limitations were a constitutionally appropriate means of combating the appearance or fact of improper influence stemming from the dependence of candidates on large campaign contributions. The ceilings imposed therefore served a compelling governmental interest in safeguarding the integrity of the electoral process without directly impinging on the rights of citizens to engage in political debate and discussion. 424 U.S. at 21-35.

Independent expenditures, however, are different. The Court found that the governmental interest in preventing the appearance or reality of corruption was simply insufficient to justify the ceiling on *independent* expenditures contained in section 608(e)(1) of the Federal Election Campaign Act of 1971 ("FECA"). First, the Court equated the expenditure of money in the political arena to speech. 424 U.S. at 19. Then it held that independent expenditures were entitled to greater—indeed, almost absolute—protection under the First Amendment. The Court explained why that was so:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

424 U.S. at 47.[8]

The Court considered expenditure restrictions to be "substantial rather than merely theoretical restraints on the quantity and diversity of political speech," which would "exclude all citizens and groups . . . from any significant use of the most effective modes of communication."[9] *Id.* at 19-20. Similarly, the Court noted that a primary effect of expenditure limitations was "to restrict the quantity of campaign speech by individuals [and] groups. . . ." *Id.* at 39. The Court reiterated the point in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), noting that "limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue. . . ." 454 U.S. at 299. A campaign expenditure limitation like section 9012(f) is therefore sustainable only if "the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45.

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[8] The Court's prescience about the lack of coordination of expenditures undermining their value to the candidate they are intended to help has been borne out by experience. Some of NCPAC's expenditures are said to have backfired, causing the candidate they were intended to help to disavow them. Organized labor's efforts on behalf of Walter Mondale (even though closely connected with the official campaign) thus far apparently have helped him in some state primaries, but have become a campaign issue in others.

[9] The Court noted the high cost—almost $7,000—of advertising in a major metropolitan newspaper. 424 U.S. at 20, n.20. That cost has continued to climb. The parties stipulated below that a similar advertisement now costs between $17,000 and $23,000 per day. Jt. Stip. 196; Exhibit 139.

The interests advanced in support of the independent expenditure limitation in *Buckley*—preventing real or apparent corruption; equalizing the relative ability of individuals and groups to influence elections; and restraining the rising cost of elections—were rejected by the Court as insufficient to sustain the expenditure limitation of section 608(e)(1). 424 U.S. at 47, 48, and 57. The Court held that the last two could never sustain a restriction on independent political expression. Only the first justification—avoiding real or apparent corruption—*might* save a limitation on expenditures, 424 U.S. at 26; and then only if there is a real showing of such corruption. 424 U.S. at 45-46.

There is no evidence of corruption, real or apparent, arising from independent expenditure efforts by groups like appellees, as the court below noted. FEC Appendix ("FEC App.") at 61a-73a. Appellants know that, so they have attempted to go around *Buckley*'s strict test of the constitutionality of independent expenditure limitations by arguing that section 9012(f) is intended to prevent committees from undermining the goals of the public financing scheme, FEC *J.S.* at 13, and to ensure that publicly-funded candidates "not have recourse to unequal additional funding." Democratic Party, *et al.* Jurisdictional Statement ("Dem. J.S.") at 6.

B. In Buckley the Court Considered and Rejected the Same Arguments Appellants Now Make

Appellants' arguments are variations on a theme this Court has already heard. The FEC's claim is similar to the argument that section 608(e)(1) was merely a "loophole-closing provision." That argument persuaded the Court of Appeals in *Buckley*, but this Court found it lacking. 424 U.S. at 45. Section 9012(f) must pass muster on its own; it cannot be saved as part of a larger statutory framework—the Fund Act—which this Court has upheld, partly on the ground that it "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge

public discussion and participation in the electoral process, goals useful to a self-governing people." *Buckley*, 424 U.S. at 92-93. Nothing about section 9012(f) facilitates speech. Instead, it strangles speech, constricting the field of permissible speakers, but exempting for no discernible reason the media, charitable organizations, and individuals. If section 9012(f) is intended to enhance the Fund Act, it does so underinclusively by exempting those with the greatest financial resources and ability to influence elections—the media and wealthy individuals—and overinclusively by reaching fully-protected advocacy by totally independent political committees.[6]

The Democratic Party appellants claim that section 9012(f) is necessary to ensure that "those candidates who are publicly funded not have recourse to unequal additional funding." Dem. J.S. at 6. This is an old argument dressed up a different way. The Court has heard it before, and has answered it: "[T]he concept that govern-

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[6] Section 9012(f) is also unconstitutionally vague. The expenditures subject to section 9012(f) are practically unlimited, for that section restricts payments for anything which would be a "qualified campaign expense" if made by a candidate. That term is defined as any expense incurred "to further" a candidate's election. 26 U.S.C. § 9002(11). The statute thus includes within its prohibitions every kind of expenditure which might be made by presidential campaigns, including an array of issue-oriented activities, in addition to express advocacy for or against a candidate's election.

Almost anything might further a candidate's election, or that of his opponent: publication of a candidate's past conduct in public office or private employment; his voting record; criticism or praise of his stand on particular issues; or even republication of his past writings. So also might public comment on the pending nomination of Edwin Meese as Attorney General, comment on nuclear arms control, or on women's issues—all hotly debated issues which might further the election of the Republican or Democratic presidential nominee, depending on the content of the speech on those issue and the audience to which it is addressed. Section 9012(f) therefore regulates not only express candidate advocacy, but issue discussion as well.

ment may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley*, 424 U.S. at 48-49, *quoted with approval in Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295-96 (1981).[7]

Moreover, the Democratic Party appellants' suggestion that publicly-funded candidates "have recourse" to additional funding implies that appellees' expenditures are unlawfully coordinated with those of the Reagan campaign. The Carter-Mondale Reelection Committee and Common Cause both thought that in 1980, when they filed administrative complaints with the FEC alleging illegal coordination between appellees and Mr. Reagan's 1980 campaign. The FEC investigated the matter for almost three years, and finally closed the file, taking no action against appellees. In 1984, the Democratic Congressional Campaign Committee filed a similar anticipatory complaint with FEC, this time against NCPAC and the Reagan/Bush in '84 Committee. That matter is pending before the FEC.

If appellees' proposed expenditures are not independent, they clearly violate the law, but not section 9012(f). Section 9012(f) restricts *independent, uncoordinated* expenditures. Coordinated expenditures are forbidden elsewhere in the federal campaign laws. They are considered to be contributions, 2 U.S.C. § 441a(a)(7)(B)(i), subjecting the contributor, the candidate, and his committees to civil and criminal penalties. 26 U.S. § 9007, 9012(a); 2 U.S.C. § 437g. If section 9012(f) is intended to pre-

[7] In any event, Section 9012(f) hardly equalizes the resources of competing candidates. For example, it expressly exempts the press and broadcast media, which routinely and publicly endorse one candidate over another and, sometimes, provide news coverage favoring one candidate or criticizing another. Individuals and groups not considered to be political committees are also free to help any candidate they choose.

vent expenditures made in concert with a candidate, it is unnecessary. If it is intended to restrict truly independent expenditures, it cannot do so after *Buckley*.[8]

C. *FEC v. National Right to Work Committee* Did Not Change the Rule of *Buckley*

The FEC and *amicus curiae* Common Cause argue that this Court's recent decision in *FEC v. National Right to Work Committee*, ("NRWC") 103 S.Ct. 552 (1982) is at odds with *Buckley*. FEC J.S. at 13; Common Cause J.S. at 5. We disagree, as did the court below. FEC App. at 52a-56a. That court correctly noted that *NRWC* was not a case involving expenditures.[9] It was a corporations case, *Id.* at 56a, one in a long line of cases that have upheld restrictions on political activities of corporations and unions. Those restrictions were justified because of what the Court called the "special advantages which go with the corporate form of organization." Unions could be closely regulated in the political arena out of concern

[8] What section 9012(f) was intended to accomplish is not at all clear. The congressional debate on section 9012(f) is rambling, partisan, and confusing. Some senators were concerned about corporate or labor committees influencing elections. *See, e.g.*, 117 Cong. Rec. 42,397-401 (1971) (remarks of Sen. Taft). But others realized the constitutional delicacy of what was at stake and made clear that they did not think section 9012(f) could reach independent expenditures. "[W]e do nothing to impinge upon freedom of speech and freedom of activity. So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will." *Id.* at 42,826 (remarks of Sen. Pastore). No one challenged this view of the statute.

[9] Neither was *California Medical Association v. FEC* ("CMA"), 453 U.S. 182 (1982), which appellants also suggested below qualified *Buckley's* holding with respect to expenditure limitations. That was a contributions case, upholding the limitation contained in 2 U.S.C. § 441a(a)(1)(c) on amounts which individuals and unincorporated associations can contribute to political committees. In *CMA*, the court quoted with approval the holding in *Buckley* concerning independent expenditure limitations. 453 U.S. at 194.

that the compulsory dues of their members not be politically misused. *NRWC*, 103 S.Ct. at 559.

Appellees cannot compel dues from anyone. Their fund-raising solicitations are explicit. Donors contribute voluntarily to NCPAC and FCM with full knowledge of what those committees stand for and how they intend to use their funds. And NCPAC and FCM are corporations for liability purposes only. There are no other "special advantages" that go with their corporate form. In fact, for all other purposes, the FEC treats them as if they were unincorporated. *See* 11 C.F.R. 114.12(a) (1983). (Treasurers of incorporated political committees are still personally liable for carrying out duties of treasurers and political committees under FECA.) In any event, appellees' corporate status cannot justify regulation of their independent expenditures under section 9012(f), for as the court noted below, that statute applies to "any committee, association or organization (whether or not incorporated). . . ." FEC App. at 56a; 26 U.S.C. § 9002 (9).

There are no "special characteristics" of independent political committees that justify their regulation under section 9012(f). *NRWC*, 103 S.Ct. at 560. Political committees range from small *ad hoc* groups to large, well-financed, long-standing committees, like NCPAC and FCM.[10] But whatever their history or purpose, so long as their expenditures are uncoordinated with and independent of a candidate's campaign, expenditures by political committees cannot be constitutionally curtailed. It is the lack of coordination of those expenditures that makes them safe against assaults like section 9012(f); for

[10] Two of the three appellees in *Common Cause v. Schmitt* were formed and operated for the sole purpose of supporting Mr. Reagan in 1980. On information and belief, they are no longer active. By contrast, FCM, the third appellee in *Schmitt*, and NCPAC, have been in existence since the early and mid-1970's. Independent expenditures are only some of what they do. *See* FEC App. at 11a.

it is that very lack of coordination that makes unlikely the reality or the appearance of the fatal *quid pro quo* that permits contribution limitations. *Buckley*, 424 U.S. at 45.

Finally, the court below rejected appellants' suggestion that *NRWC* requires courts to defer to Congress when reviewing legislation purportedly aimed at eliminating corruption in elections. FEC App. at 58a-60a. Congress' wish is not this Court's command. Even if Congress clearly indicated that eliminating corruption was the goal of legislation that burdens First Amendment freedoms (something it certainly did not do with respect to section 9012(f)) that is not the beginning and end of judicial review of that legislation. After all, even in *NRWC*, the Court recounted and reaffirmed past decisions, which themselves examined congressional determination as to the need for regulation of corporate and union political activities. 103 S.Ct. at 560.

D. Section 9012(f) Is No Different From the Statute Struck Down in *Buckley*

The fact that section 9012(f) applies only to political committees and not to individuals does not save it from *Buckley*.

In *Buckley* the court repeatedly noted the strangling effect of section 608(e)(1) on independent expenditures by individuals and *groups*.[11] There is no indication that the decision in *Buckley* turned on the effect of that section solely on individuals.[12] It could not turn on that dis-

[11] *See, e.g.*, 424 U.S. at 19, 29, 39, 40, 57.

[12] Any doubt on that score was surely dispelled by this Court's description in *CMA* of its holding in *Buckley*. The Court described *Buckley* as striking down expenditure limitations because "they directly restrained the rights of citizens, candidates and *associations* to engage in protected political speech." 453 U.S. at 194 (emphasis added).

tinction, for it makes no constitutional difference whether citizens engage in independent advocacy singly or in groups. *See First National Bank of Boston v. Bellotti*, 435 U.S. 767, 777 (1978). ("The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual.") Whether or not speech is protected and whether it can be regulated depends on the reasons asserted to justify its regulation. It does not depend on the identity of the speaker.[13] Indeed, *Buckley* upheld restrictions on contributions precisely *because* alternative avenues of independent expression were available to individuals and *groups*, the Court recognizing that political advocacy could be given its strongest and most effective voice in groups. 424 U.S. at 15.

Moreover, there is no assurance that, in the hands of the FEC, section 9012(f) will not be used against individual speech. The FEC's advisory opinions on who is and is not a political committee are not comforting on that score.[14]

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[13] We contend that appellees, as political committees, have a right of free speech on issues of public importance, just as individuals have such a right. *See Bellotti*, 435 U.S. at 788, n.26. But we do not base our constitutional challenge to section 9012(f) solely on the vindication of appellees' First Amendment right of speech. We simply rely on the principle announced in *Bellotti* that the source of speech does not affect its right to constitutional protection.

[14] *See, e.g.*, the lower court's brief summary of the FEC's expansive definition of "political committee." FEC App. at 92a. *See also* Chief Judge Kaufman's concurring opinion in *Federal Election Commission v. Central Long Island Tax Reform, Etc.*, 616 F.2d 45 (2nd Cir. 1980), noting that "when an official agency of government has been created to scrutinize the content of political expression . . . such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled or sterilized." 616 F.2d at 55.

II. SECTION 9012(f) CANNOT BE NARROWED TO SAVE IT

In an effort to avoid having to strike down the statute, the court below closely examined possible narrowing constructions of section 9012(f). FEC App. at 87a-93a. The Democratic Party appellants suggested below that section 9012(f) might be saved if it were limited only to those groups whose members retained some form of "control" over the expenditure of the group's funds. *See, e.g., Id.* at 87a, n.57. The court correctly recognized that:

> 1. There is no evidence in the legislative history of section 9012(f) to so limit the application of that statute.
>
> 2. The "control test" renders the statute unconstitutionally vague, since the court could not fashion a definition of "control" sufficient to fairly inform those who wish to engage in independent expenditures of when they risked running afoul of the criminal sanctions of section 9012(f).
>
> 3. If "control" were the test of the applicability of section 9012(f), a soliciting organization or group would always risk becoming a political committee (subject to that section) if it did not inform its contributors of precisely how it intended to use their contributions.

FEC App. at 88a-92a. The court found the "control" theory unworkable.

It is unworkable. Section 9012(f) simply cannot be narrowed without distorting it beyond recognition and congressional intent.[15] Nothing can save section 9012(f). Independent advocacy—at least by ideological groups like NCPAC and FCM—does not corrupt, and it therefore cannot be restricted.

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[15] Moreover, narrowed or not, section 9012(f) would still leave individuals, the broadcast media, newspapers and charitable groups free to spend as much as they wished.

CONCLUSION

It is the decision by a candidate to accept public campaign financing that subjects that candidate to the Fund Act's restrictions on private campaign funding and the reporting and other requirements of the Act. That, of course, is the candidate's choice. In exchange for public financing, the candidate must surrender the prerogative of private contributions. But a candidate's decision to receive public monies cannot prevent citizens from expressing themselves on the merits of that candidate. They are still free to speak out singly and (but for section 9012 (f)) in groups. Indeed, a three-judge district court has addressed that very point. A candidate's decision to accept public funding does not abridge the right of that candidate's supporters to contribute *because* "uncoordinated expenditures are permitted without limit." *Republican National Committee v. FEC*, 487 F.Supp. 280, 286 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980). Appellants would now have this Court undo one more right of private citizens—the right to band together to express themselves effectively on the merits of a publicly-funded Presidential candidate,[16] independently of the candidate, and outside the political parties. There is no reason why the Court should do that, and every reason why it should not. The court below said it well:

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[16] Independent expenditure limitations "preclude[] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley*, 424 U.S. at 22. "Collective expressions of a group" are entitled to as much protection as "the voice of one individual." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 296. *See also Common Cause v. Schmitt*, 512 F.Supp. at 497. "The communication sponsored by the political committees is the language of their members and contributors because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees."

> The defendants in these actions have identified the critical vice of section 9012(f): were it not repugnant to the Constitution, it would give the institutionalized political parties an almost impervious monopoly over the agenda and terms of debate in presidential electoral campaigns. Were we to give our blessing to the law examined in these actions, we would be permitting only those few with control over our major political parties, our institutional press, or with vast individual resources, to capture the economies of scale inherent in our national society and thus to be heard above the din of everyday existence. Where the threat of corruption is so minimal, we cannot so abnegate our responsibilities. (footnote omitted.)

FEC App. at 99a.

There is nothing supporting section 9012(f) except appellants' fanciful concerns and assumptions. This Court should summarily affirm the decision below.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

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FEDERAL ELECTION COMMISSION,

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NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,

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DEMOCRATIC PARTY OF THE UNITED STATES, *et al.*,

Appellants,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF THE NATIONAL CONGRESSIONAL CLUB AS *AMICUS CURIAE* SUPPORTING SUMMARY AFFIRMANCE

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In The

Supreme Court of the United States

October Term, 1983

Nos. 83-1032 & 83-1122

Federal Election Commission,
Appellant,

v.

National Conservative Political
Action Committee, *et al.*,
Appellees.

Democratic Party of the
United States, *et al.*,
Appellants,

v.

National Conservative Political
Action Committee, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF THE NATIONAL CONGRESSIONAL CLUB AS *AMICUS CURIAE* SUPPORTING SUMMARY AFFIRMANCE

Pursuant to Rule 36.1 of the Rules of this Court, the National Congressional Club submits this brief as *amicus curiae* supporting summary affirmance.*

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* Pursuant to Rule 36.1, letters consenting to the filing of this brief have been obtained from the parties and filed with the Clerk of the Court.

INTEREST OF THE NATIONAL CONGRESSIONAL CLUB

The National Congressional Club ("NCC") is an unincorporated political committee whose purpose is to promote the conservative philosophy of government by supporting conservative candidates for public office and legislation furthering conservative goals. Formed in 1973 and based in Raleigh, North Carolina, the NCC supports candidates for public office through contributions, independent expenditures, and issue-oriented educational programs. Financial support for conservative candidates is raised from among more than 100,000 members and non-member contributors. The average contribution is $20 to $30.

NCC's members and non-member contributors exercise control over its agenda. From members, funds are solicited for a designated series of specific political projects; from non-member contributors, funds are solicited for individual projects on an *ad hoc* basis. Those projects that member and non-member contributors are unwilling to fund cannot be pursued. NCC made substantial independent expenditures in support of Governor Reagan in 1980 during the presidential primary and general election campaigns, and intends to make such expenditures in support of President Reagan's re-election campaign this year. Because it is an association subject to the expenditure limitation imposed by the Presidential Election Campaign Fund Act, 26 U.S.C. § 9012(f),[1] NCC has a direct and vital interest in this case.

STATEMENT OF THE CASE

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (*per curiam*), this Court invalidated campaign-expenditure limitations established by the Federal Election Campaign Act ("FECA").[2] Examining

[1] Section 9012(f), enacted in 1971, is set forth in the appendix to this brief.

[2] The expenditure limitations restricted individuals and groups to an expenditure of $1,000 per calendar year "relative to a clearly identified

(footnote continues)

the three justifications advanced to support such limitations—prevention of actual and apparent corruption, equalization of the relative ability of individuals and groups to influence the outcome of elections, and restraint on the costs of political campaigns—the Court found each an insufficient basis for limiting campaign expenditures. 424 U.S. at 44-58. The Court held that limitations on expenditures "place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.* at 58-59.

Four years later, the United States District Court for the District of Columbia, applying this Court's reasoning in *Buckley*, invalidated a similar campaign-expenditure limitation established by the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. § 9012(f), which prohibits any independent political committee [3] from spending more than $1,000 to further the election of a publicly funded presidential candidate.[4] In December 1983, that limitation was again invalidated under *Buckley* by the three-judge district court in this case. Section 9012(f), the court held, "violates the first

(footnote continued)

candidate," 18 U.S.C. § 608(e)(1); restricted expenditures by a candidate from personal or family resources to amounts ranging from $25,000 to $50,000 in connection with his campaign, depending on the office sought, *id.* § 608(a)(1); and restricted overall campaign expenditures by candidates seeking nomination for election and election to federal office, with the particular ceiling depending on the office sought. *Id.* § 608(c)(1). These limitations were added to the FECA in 1974.

[3] The Fund Act defines "political committee" as "any committee, association or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the nomination or election of one or more candidates to Federal, state or local elective public office." 26 U.S.C. § 9002(9). A political committee is "independent," or "unauthorized," if its expenditures are not authorized or controlled by, or coordinated with, a candidate or his agents. *See Buckley*, 424 U.S. at 46-47.

[4] *Common Cause* v. *Schmitt*, 512 F. Supp. 489, 496-501 (D.D.C. 1980) (3-judge court), *aff'd by an equally divided Court*, 455 U.S. 129 (1982).

amendment to the Constitution because it threatens to chill and to punish much speech that Supreme Court decisions have held to be protected." Slip op. at 9.[5] This appeal followed.

SUMMARY OF ARGUMENT

Buckley established that campaign-expenditure limitations, except where voluntarily accepted by subsidized candidates, are constitutionally impermissible; the interests such limitations serve, the Court held, are in part illegitimate and in part inadequate to justify the resulting burden on protected speech. Appellants argue that *Buckley* should not control because § 9012(f) prevents circumvention of expenditure limitations on publicly funded presidential candidates and their authorized political committees; because it equalizes spending on behalf of such candidates; and because it applies only to political committees. None of these arguments saves § 9012(f) from invalidation under *Buckley*.

Section 9012(f) must stand or fall on its own merits. It cannot survive review simply because it may reinforce other, less intrusive campaign spending limitations. On the merits, § 9012 does not withstand scrutiny. The fact that a presidential candidate has accepted public funds cannot extinguish the First Amendment rights of his supporters or validate an "equalization" purpose which this Court has held illegitimate. Nor do expenditures by independent political committees present the reality or appearance of corruption that this Court in *Buckley* held alone justifies campaign-spending limitations, and nothing in the legislative history of § 9012(f) suggests that corruption or its appearance was the target of this expenditure ceiling. Thus § 9012(f) fails to survive the exacting scrutiny applicable to direct restraints on First Amendment rights.

Foreclosed by *Buckley* from defending § 9012(f) on its own terms as a campaign-expenditure limitation, appellants seek to recast the provision as an essential component of a larger statutory scheme that can be defended (and, indeed, one that this Court in *Buckley* upheld)—namely, the Fund Act's

[5] Appellees were supported below by the American Civil Liberties Union as *amicus curiae*; appellants were supported by Common Cause.

scheme for optional public financing of presidential election campaigns, of which § 9012(f) is a part. Under the Fund Act, presidential candidates who accept public campaign financing may not, broadly speaking, accept private contributions or make expenditures beyond a ceiling fixed by law.[6] Appellants insist that § 9012(f) must be upheld "in order to ensure the effectiveness of public financing as an alternative means of financing presidential election campaigns." FEC J.S. at (i). *See also id.* at 11-14; DEM J.S. at 6; CC Brief at 3, 4.[7]

By linking the fate of public financing to § 9012(f), appellants presumably hope to persuade this Court that the questions presented by their appeal—questions already decided in *Buckley*—are substantial. But the reality is that § 9012(f) is not integral to the Fund Act's scheme of public campaign financing. From the standpoint of Congress' twin purposes in enacting that plan—freeing presidential candidates from the burdens of raising campaign funds from private sources, and enabling presidential candidates to campaign without becoming (or appearing to become) beholden to private contributors—, § 9012(f) is simply a *non sequitur*: limiting independent expenditures serves neither of these goals. Nor can any narrowing construction cure § 9012(f)'s defects.

For these reasons, the judgment below is plainly correct and summary affirmance is therefore appropriate; the challenges presented by appellants "are so unsubstantial" as not to require plenary consideration. Sup. Ct. R. 16.1(c).

[6] Publicly funded major-party candidates may accept private contributions to the extent that the Presidential Election Campaign Fund is insufficient to provide the amount to which they are entitled by law, while publicly funded minor-party candidates may accept private contributions to the extent needed to make up the difference between the amount to which they are entitled and the major-party entitlement. *See* 26 U.S.C. §§ 9003(b) & (c).

[7] "FEC J.S." refers to the jurisdictional statement of the Federal Election Commission, "DEM J.S." refers to the jurisdictional statement of the Democratic Party of the United States and the Democratic National Committee, and "CC Brief" refers to the brief of Common Cause as *amicus curiae*.

ARGUMENT

I.

SECTION 9012(f) IS INVALID UNDER THIS COURT'S DECISION IN *BUCKLEY* v. *VALEO*.

A. *Buckley* Established that Campaign-Expenditure Limitations Are Constitutionally Impermissible.

In *Buckley*, this Court recognized that campaign-expenditure limitations restrict "political expression 'at the core of . . . First Amendment freedoms.'" 424 U.S. at 39, *quoting Williams* v. *Rhodes*, 393 U.S. 23, 32 (1968). "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19 (footnote omitted). As the Court subsequently held, "limits on expenditures operate as a direct restraint on freedom of expression" of those "desiring to engage in political dialogue." *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 299 (1981). Accordingly, a campaign-expenditure limitation may be sustained only if "the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45.[8]

Reviewing the three sets of interests advanced in support of FECA's limitations on campaign expenditures, the Court in *Buckley* found each constitutionally insufficient to justify the resulting burden on protected rights of speech and association.

First, the Court held that "the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify [a] ceiling on independent expenditures." *Id.* at 45. "The absence of prearrangement and coordination of an [independent] expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.* at 47. The government's interest in preventing arrangements that foster or suggest this sort of *quid pro quo*—which alone is what constitutes the "corruption or appearance of corruption" at which a campaign-financing limitation may be aimed—simply is not served by a cap on independent advocacy.

[8] The Court in *Buckley* held that expenditure limitations may be imposed on a presidential candidate as a condition of his voluntary acceptance of public campaign financing. 424 U.S. at 95.

Second, the Court rejected the argument that expenditure limitations may be justified by "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." *Buckley*, 424 U.S. at 48. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources,"' and '"to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."' The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley*, 424 U.S. at 48-49 (citations omitted).[9]

Third, the Court rejected as an insufficient justification for expenditure limitations any asserted governmental interest "in reducing the allegedly skyrocketing costs of political campaigns." *Buckley*, 424 U.S. at 57. As the Court stated:

> "[T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the

[9] This holding was reaffirmed in *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 295-96 (1981).

> people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.* (footnote omitted).

To the extent that the appellants rely on any of these three purported governmental interests to justify the expenditure limitation established by § 9012(*f*), such reliance is nothing less than a rejection of one of this Court's central holdings in *Buckley*—a holding that the Court has since reaffirmed both explicitly, *see California Medical Ass'n* v. *FEC*, 453 U.S. 182, 194-95 (1981) (plurality opinion); *id.* at 202 (Blackmun, *J.*, concurring), and implicitly, *Citizens Against Rent Control*, *supra*, 454 U.S. at 296-97. Clearly, these holdings command respect as a matter of *stare decisis*. *See City of Akron* v. *Akron Center for Reproductive Health*, 103 S. Ct. 2481, 2487 & n.1 (1983).

B. *Buckley*'s Ban on Campaign-Expenditure Limitations Requires Invalidation of § 9012(*f*).

Appellants suggest, however, that *Buckley*'s ban on campaign-expenditure limitations should not control the disposition of this appeal. *First*, they claim that § 9012(*f*) legitimately seeks to prevent circumvention of the expenditure limitations imposed on authorized political committees of publicly funded presidential candidates under the Fund Act. FEC *J.S.* at 13. *Second*, they assert that § 9012(*f*) is necessary to assure that "those candidates who are publicly funded not have recourse to unequal additional funding." DEM *J.S.* at 6. *Finally*, they argue that § 9012(*f*) limits expenditures by a "particular type of organization" with a special "potential . . . to undermine the goals of the public financing scheme." FEC *J.S.* at 13. None of these justifications can withstand scrutiny.

This Court has not been impressed before by "circumvention" arguments of the type advanced here. In both *Buckley* and *Citizens Against Rent Control*, the Court rejected the notion that one limitation on protected expression may be defended on the ground that it reinforces other, more defensible limitations: "The markedly greater burden on basic free-

doms caused by [one limitation] . . . cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive . . . limitations." 424 U.S. at 44; *see also* 454 U.S. at 298. As a direct restraint on protected expression, § 9012(*f*) must be shown to be necessary to serve some compelling governmental interest that cannot be achieved in any less restrictive way; and it must be shown to serve that interest effectively, lest any doubt arise as to "the plausibility of the [government's] purported concern." *First National Bank* v. *Bellotti*, 435 U.S. 765, 793 (1978). *See also Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104-05 (1979); *id.* at 110 & n.3 (Rehnquist, *J.*, concurring in judgment).

Section 9012(*f*) fails on both counts. Even if reinforcing the Fund Act's limitations on contributions to and expenditures by publicly funded candidates and their authorized political committees were deemed a "compelling" purpose, the fact is that § 9012(*f*)'s limitation on independent campaign expenditures is a demonstrably over-inclusive means of effectuating that purpose. Section 9012(*f*) does not simply limit the potential for "subterfuge" presented by sham independent political committees, *see* FEC *J.S.* at 13: it limits fully protected expression by *bona fide* independent political committees, whose expenditures are truly uncoordinated with and uncontrolled by any publicly funded presidential candidate or his authorized committees.[9] Section 9012(*f*) is impermissibly under-inclusive as well, for it does not reach expenditures by individuals and excludes those by a variety of groups, including

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[9] Section 9012(*f*) is not needed to limit expenditures made in consultation with (or otherwise coordinated with) an eligible candidate's campaign, for FECA separately limits political committees in making "contributions" to candidates for federal office, 2 U.S.C. § 441a, and "contributions" are defined to include, *inter alia*, "expenditures in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." *Id.* § 441a(a)(7)(B)(i). *See Buckley*, 424 U.S. at 46-47.

Moreover, the Fund Act's legislative history does not support the FEC's suggestion that the purpose of § 9012(*f*) was to prevent the use of political committees as a "subterfuge" to circumvent the spending limitations applicable to authorized political committees. *See* FEC *J.S.* at 13, *quoting* 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Taft). That characterization of

(footnote continues)

the media. Like the $1,000 ceiling on campaign expenditures struck down in *Buckley*, § 9012(f) "prevents only *some* large expenditures." 424 U.S. at 45 (emphasis added). Thus § 9012(f) cannot even be justified as a prophylactic. *See id.*[11]

(Footnote continued)

§ 9012(f)'s purpose was offered by Senator Taft, who voted against the Fund Act, 117 Cong. Rec. 42,633 (1971), in support of an amendment (ultimately rejected) that would have imposed § 9012(f)'s $1,000 expenditure limit not only on political committees but also on corporations, labor organizations, partnerships, political education committees, and "any other type of organization." 117 Cong. Rec. 42,397-402 (1971).

The floor debate over Senator Taft's amendment, which constitutes the only focused consideration of § 9012(f) by Congress, leaves § 9012(f)'s purpose murky at best. *See, e.g.*, 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore, sponsor of the Fund Act). If that debate makes anything clear, it is that § 9012(f)'s supporters were themselves deeply troubled—even in 1971, five years before *Buckley*—by "the freedom of speech point and how far we may go to circumvent that." *Id.* at 42,400 (remarks of Sen. Pastore). "[F]rankly," Senator Pastore confessed, "I do not have the perfect answer." *Id.* at 42,401.

[11] Because § 9012(f) exempts the media and tax-exempt organizations, as well as individuals, from its expenditure limitation, the provision violates the equal-protection rights of political committees and those who comprise them. The court below observed that, "if we were not deciding this case on free amendment grounds and if defendants had pressed the argument, we might have serious problems with the statute on equal protection grounds." Slip op. at 61 n.33. As the court stated, § 9012(f)

> "explicitly allows corporate spending. So long as the corporation is a periodical publication, *cf.* an FCC regulated broadcaster or a tax-exempt organization, section 9012(f)(2)(C) makes clear that 9012(f)(1) does not bar the corporation from spending as much as it pleases on behalf of presidential candidates. *Cf.* Powe, *Mass Speech and the Newer First Amendment*, 1982 S. Ct. Rev. 245, 268 ('If a newspaper is allowed to reach and propagandize so many readers, why should citizens be prevented from banding together and trying to counter it?')." Slip op. at 61 n.33.

Cf. Houchins v. KQED, 438 U.S. 1, 16 (1978) (media have no special right of access to county jail different from or greater than that accorded the public generally).

Apart from equal-protection concerns, the provision's limitation on campaign expenditures by groups, while individuals remain free to spend without limit, presents an additional abridgment of protected associational

(Footnote continues)

Similarly, § 9012(f) cannot be justified as necessary to ensure that "publicly funded [candidates] not have recourse to unequal additional funding." DEM *J.S.* at 6. The goal of equalizing the relative abilities of individuals and groups to influence the outcome of elections is one that the Court in *Buckley* ruled impermissible on its face. The fact that § 9012(f) applies only to independent expenditures by supporters of publicly funded candidates cannot somehow render the goal of equalization of speech any more legitimate here than it was in *Buckley*.[12]

(Footnote continued)

rights. *See Citizens Against Rent Control, supra*, 454 U.S. at 296 (holding that the right of association is abridged by a municipal ordinance that placed a limit on individuals "wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone").

[12] Appellants cannot escape that inconvenient reality by speaking of § 9012(f) as a limit on the financial support to which publicly funded presidential candidates "have recourse," since the expenditures that § 9012(f) limits are independent expenditures. Moreover, even if "equalization" were a permissible goal, § 9012(f) fails to achieve it. Notwithstanding § 9012(f)'s limit, inequality can result from campaign expenditures by individuals or by the groups not subject to § 9012(f)'s ceilings, who are free to enhance the prospects of publicly funded candidates.

As already shown, it is difficult to ascribe any coherent purpose to § 9012(f), whether there was a serious purpose to equalize spending is questionable. Senator Pastore, the bill's sponsor, described the bill as "a financing measure; . . . not a bill to provide a ceiling." 117 Cong. Rec. 41,932 (1971). Opponents pointed out that if there was any intent to impose equal limits or ceilings the bill did not accomplish that goal. *Id.* at 42,400 (remarks of Sen. Griffin); *id.* at 42,401 (remarks of Sen. Dominick).

Nor does the Fund Act even afford all presidential or whatever equal public funding; minor-party and independent candidates are relatively disadvantaged. While such candidates may accept contributions to the extent needed to make up the difference between their public funding and the major-party entitlements, § 9012(f) would eliminate another means of enhancing their prospects—independent expenditures by political committees of their supporters. Such a handicap can scarcely be said to serve the cause of equalizing the relative prospects of publicly funded candidates.

The notion that a candidate's voluntary acceptance of public financing empowers the government to limit the speech of his supporters in order to place him on an equal footing with his opponents is wholly untenable. A candidate cannot effectively exercise the First Amendment rights of others. *See ACLU* v. *Jennings*, 366 F. Supp. 1041, 1053 (D.D.C. 1973) (3-judge court), *vacated as moot*, 422 U.S. 1030 (1975). Indeed, a three-judge district court has held that the Fund Act's public-financing provisions do not abridge the rights of a publicly funded candidate's supporters precisely because "unconditioned expenditures are permitted without limit," *Republican National Committee* v. *FEC*, 487 F. Supp. 280, 286 (S.D.N.Y. 1980), and this Court summarily affirmed. 445 U.S. 955 (1980). As the district court observed in *Common Cause* v. *Schmitt*, *supra*:

> "Supporters of candidates have rights separate from the candidates they favor, rights which cannot be alienated by the candidate's choice with regard to public funding. There is no constitutional reason that the organization of individual supporters of a candidate into groups called 'political committees' should impinge the distinct and separate rights of campaign candidates to sponsor political speech. Independent expenditures are the principal—and protected—source of this sponsorship." 512 F. Supp. at 496.

Finally, the fact that § 9012(f) limits expenditures only by political committees cannot save it from invalidation under *Buckley*. To be sure, this Court has made clear that the "special characteristics" of some types of organizations may justify "particularly careful regulation," *FEC* v. *NRWC*, 103 S. Ct. 552, 560 (1982); but appellants can point to no "special characteristics" of political committees as such that could support the expenditure limitation established by § 9012(f).[13] Moreover, there is nothing in § 9012(f)'s legislative history to

[13] The term "political committee" is broadly defined. *See* p. 3, n.3, *supra*.

suggest that § 9012(f) was directed against corruption or the appearance of corruption—the only evil that this Court has held may justify campaign-spending restraints.[14] A statute burdening protected activity cannot be constitutionally justified on a ground which cannot be demonstrated to have been a purpose which Congress sought to achieve. *See Califano* v. *Westcott*, 443 U.S. 76, 86-88 (1979); *Weinberger* v. *Weisenfeld*, 420 U.S 636, 648 (1975).

The election spending limitations that this Court discussed in *NRWC*, moreover, were limitations on contributions by corporations and labor unions to candidates in certain federal election campaigns, and the grounds held adequate to justify such limitations simply do not apply to expenditures by political committees as a class. Section 9012(f) limits independent expenditures, not contributions; thus it bears no relation to problems of *quid pro quo*. Nor do independent expenditures by political committees present any of the problems of coercion that arise when corporations or labor unions spend the contributions of their stockholders or members for political purposes. *Compare FEC* v. *NRWC*, *supra*, 103 S. Ct. at 559.

[14] The district court exhaustively examined the evidence introduced by the plaintiffs to show that independent campaign expenditures by political committees subject to § 9012(f)'s limitation give rise to corruption or the appearance of corruption sufficient to justify § 9012(f)'s expenditure limitation, and correctly found the proffered evidence wholly unpersuasive. *See* Slip op. at 65-85. Even if such evidence had been persuasive, the district court could not properly have sustained § 9012(f) on the strength of that evidence. All of the evidence related to activities in 1980 and later; independent political committees played no appreciable role in a presidential election campaign until 1980.

Post-1971 experience cannot retrospectively validate 1971 legislation. When fundamental rights are at stake, a statute can be upheld only on the basis of the facts before Congress at the time of enactment. *Cf. Rostker* v. *Goldberg*, 453 U.S. 57, 74-75 (1981) (in assessing constitutionality of 1948 selective service statute's exemption of women from draft registration, Court would examine evidence adduced in 1980 bearing on validity of exemption only because at that time Congress thoroughly reconsidered the exemption and specifically declined to repeal it). It is certain that Congress had no evidence in 1971 sufficient to establish a nexus between independent expenditures and corruption, for this Court held in *Buckley* that no such evidence existed as late as 1976. *See* 424 U.S. at 46.

Political committees encompass a wide array of associations—from short-lived, *ad hoc* groups of relatively modest means, formed for the purpose of running a series of advertisements in a local newspaper supporting a candidate, to more enduring, elaborately structured, and well-financed groups that give nationwide independent support to a candidate's campaign. Thus, while it is true that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the political process,' " *FEC* v. *NRWC*, *supra*, 103 S. Ct. at 560, *quoting California Medical Ass'n*, *supra*, 453 U.S. at 201, no "special characteristics" of independent political committees could support the blanket restriction on the exercise of First Amendment rights that § 9012(*f*) imposes.[15] No threat to the "integrity of

[15] At issue in *NRWC* was a provision of FECA forbidding a corporation to solicit contributions to a segregated political fund from any persons other than its "members." 2 U.S.C. § 441b(b)(4)(C). The Court dismissed claims that the limitations on a corporation's or labor union's ability to solicit contributions to such funds impermissibly interfere with its ability to engage in protected political activities; the Court pointed out that the government is permitted to regulate the political activities of corporations and labor unions to offset the "special advantages" such organizations enjoy, 103 S. Ct. at 559—corporations by virtue of their ability to amass wealth by dint of the "corporate form," and labor unions by virtue of their ability to compel the payment of dues by their members. *Id.*

Political committees like appellees NCPAC and FCM, while incorporated for liability purposes, enjoy none of the "particular legal and economic attributes" that this Court has held permit special regulation of corporations as such. *Id.* at 560. Indeed, they are not deemed to be corporations by the FEC for purposes of the federal election laws. 11 C.F.R. § 114.12(a) (1983). In any event, § 9012(*f*) applies not only to corporations but to "any committee, association or organization" engaged in campaign activities. *See* p. 3, n.3, above. By contrast, the campaign-spending limitation upheld by the Eleventh Circuit in *Athens Lumber Co.* v. *FEC*, 718 F.2d 363 (11th Cir. 1983) (*en banc*) (*per curiam*), *cert. denied*, No. 83-1190 (March 19, 1984),—cited by Common Cause at p. 5 of its brief—is limited to spending by corporations and labor organizations, *see* 2 U.S.C. § 441b(a); and such entities, as noted above, are permitted to establish, administer, and solicit contributions to separate segregated funds "to be used for political purposes." *See id.* § 441b(b)(2)(C).

the political process" from such groups has been shown, and no such threat inheres in their structure or purpose.[16]

II.

SECTION 9012(*f*) IS NOT INTEGRAL TO THE FUND ACT'S PUBLIC-FINANCING SCHEME.

Undoubtedly because they recognize that § 9012(*f*) cannot be defended on its own terms as an expenditure limitation, appellants seek to portray it as a necessary element of the Fund Act's general scheme for optional public financing of presidential election campaigns; indeed, the FEC goes so far as to claim that § 9012(*f*)'s expenditure limitation "lie[s] at the core of the public funding scheme," *J.S. FEC* at 12, and appellant Democrats claim that § 9012(*f*) is necessary "to prevent evasion of [one of] the most fundamental policies of the . . . Fund Act—that Presidential campaigns be publicly funded." *J.S. DEM* at 6. *See also CC Brief* at 3, 4. Both claims are manifestly without merit, and even if they were correct they would be insufficient to sustain § 9012(*f*).

The Fund Act "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93. Its policy is not, as appellant Democrats suggest, to mandate public campaign financing as an end in itself, but rather to make such financing available—on an optional and limited basis—as "a means of eliminating the improper influence of large private *contributions*," *id.* at 96 (emphasis added), and as "[a] . . . means of relieving major-party candidates from the rigors of soliciting private *contributions*," *id.* (emphasis added).

[16] Nor may § 9012(*f*) be justified on the ground that advocacy by independent political committees is not direct political expression but, like contributions to a candidate which enhance his ability to speak, merely "proxy" speech. *Citizens Against Rent Control*, *supra*, settled any doubt that might have existed that "collective expressions of a group" are as fully protected by the First Amendment as "the voice of one individual." 454 U.S. at 296.

A limitation on independent expenditures by political committees that are neither controlled by nor coordinated with a candidate or his authorized political committees simply does not serve either of these aims, and neither aim would be frustrated in the absence of the limitation imposed by § 9012(f). Far from lying at the core of the public-financing scheme, § 9012(f) is at war with the Fund Act's most fundamental purpose—that of enhancing "discussion and participation in the electoral process." *Id.* at 93. Section 9012(f) is ultimately defensible only on the theory that, without the limitation it would impose, there will be either too much speech or unequal speech; and this Court has already rejected such justifications. See pp. 7-8, above.

If § 9012(f)'s limitation on independent expenditures by political committees were deemed vital to the effectiveness of the public-financing scheme, the result would be not to save § 9012(f), but to call the validity of the public-financing scheme itself in question. This Court in *Buckley* held the financing scheme constitutional, in part, because the expenditure limit it imposes on a publicly funded presidential candidate is one to which the candidate "voluntarily assents." 424 U.S. at 99. To permit the candidate's voluntary acceptance of that limit to extinguish the rights of those independently seeking to advocate his cause would, as noted above, sanction an impermissible abridgment of their First Amendment rights. Thus, appellants gain nothing from linking the fate of public financing to § 9012(f), for even if the link were real—which it is not—the connection would bring down the entire structure.

III.

NO NARROWING CONSTRUCTION CAN SAVE § 9012(f).

The district court was correct in concluding, *see* Slip op. at 93-99, that no narrowing construction could save § 9012(f). First, there is no doubt that Congress intended § 9012(f) to

limit independent expenditures by all political committees not authorized by a candidate; any narrowing construction would do violence to the plain meaning of the provision and replace it with a judicially fashioned compromise that Congress never intended.

In any event, no narrowing construction could cure § 9012(f)'s defects. If the result were to limit only coordinated expenditures, then the narrowing construction would be tantamount to invalidation: § 9012(f) would be redundant if construed to limit only such expenditures, since they are limited by other provisions not challenged here. See p. 9, n.10, above. If § 9012(f)'s limitation were held to be applicable only to political committees not controlled by those who finance them—as was suggested below by appellants—the result would be impermissibly vague, since "control" in these circumstances could not be defined with sufficient clarity to pass due-process muster or to avoid a chilling effect on protected speech. Such a narrowing construction would also be entirely irrational, since limiting independent expenditures as such cannot be shown to serve a legitimate governmental purpose.

Finally, to avoid gratuitous abridgment of rights of association and equal protection, § 9012(f) would—even if sufficiently narrowed to solve its other problems—have to be broadened to limit independent expenditures by individuals, news media, and other organizations now excluded from the provision's limitation and not otherwise constrained. Even if such wholesale rewriting of a statute were properly a judicial task, any such efforts to "save" § 9012(f) would prove constitutionally fatal.

CONCLUSION

For the foregoing reasons, the judgment below is manifestly correct and should be summarily affirmed.

Respectfully submitted.

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March 1984

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APPENDIX

Section 9012(f) provides:

(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to (A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions, or (B) expenditures by any organization described in section 501(c) which is exempt from tax under section 501(a) in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
MAR 24 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1122 (5)
No. 83-1032 (6)

In the Supreme Court of the United States

October Term, 1983

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.,
Appellants,

vs.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,
Appellees.

FEDERAL ELECTION COMMISSION,
Appellant,

vs.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE, GULF & GREAT PLAINS LEGAL FOUNDATION AND HOUSTON POLITICAL ACTION COMMITTEE, IN SUPPORT OF APPELLEES' MOTION TO AFFIRM

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March 23, 1984

No. 83-1122
No. 83-1032

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October Term, 1983

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AFFIRM

COME NOW Amici Curiae Gulf & Great Plains Legal Foundation and Houston Political Action Committee and hereby request this Honorable Court to grant them leave to file their Brief Amici Curiae in the captioned case.

The Interest of Amici Curiae is set out in the Brief being filed herewith.

Leave to file is being requested due to a last-minute inability to obtain consent of all of the parties to this case. There are four parties in

these consolidated appeals. Appellees, National Conservative Political Action Committee et al., are represented by Mr. Robert R. Sparks, Jr., of Sedam & Herge. Appellees have consented by letter dated March 19, 1984, to the filing of this Amici Curiae Brief. That letter has been forwarded to the Court herewith.

The Democratic Party of the United States is the principal Appellant in No. 83-1122. Counsel of record for the Democratic party, Mr. Steven B. Feirson, of the firm of Dechert, Price, and Rhoads, has orally consented to participation by these Amici. A letter from Mr. Feirson is en route to counsel for Amici and will be forwarded to the Court immediately upon receipt.

Mr. A. Richard Gerber, who is counsel for the individual plaintiff

in No. 83-1122, the suit brought by Democratic Party, postponed either the grant or denial of his consent pending consultation with counsel for the Democratic Party. However, he was unable to make contact prior to leaving town on a family vacation where he cannot be reached. He is expected back in his office on Tuesday, March 27, 1984.

In No. 83-1032, counsel for the Federal Election Commission, Mr. Charles N. Steele, has, on the day this is being written, finally refused consent. Attempts were made by counsel for Amici to obtain consent from the Federal Election Commission for several days, but the decision was delayed due to the necessity of consultation among counsel within the FEC.

Counsel for Amici did not delay in seeking consent from the parties,

and it could have reasonably been expected that consent would be forthcoming in a case such as this one. The only party that has expressly refused consent is the Federal Election Commission. It is the understanding of counsel that ordinarily the United States Government does not object to the submission of Briefs Amicus Curiae. Furthermore, both the American Civil Liberties Union and Common Cause appeared in an amicus curiae capacity in the District Court on opposite sides of the issue. It is counsel's understanding that Common Cause has already submitted a Brief Amicus Curiae on this appeal, and that Amicus Briefs from other interested parties will likely be forthcoming.

Amicus Houston Political Action Committee has a direct stake in the outcome of this appeal, since it is a reg-

istered political action committee, and thus is subject to the limitations of 26 U.S.C. § 9012(f), the constitutionality of which is being considered in this case.

For the foregoing reasons, Amici respectfully request that this Motion for Leave be granted.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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March 23, 1984

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INTEREST OF AMICI CURIAE

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the protection of individual and

constitutional rights, the preservation of the free enterprise system, and the promotion of limited government. In pursuance of such goals, the Foundation is profoundly concerned with any attempt to place limits on political free speech in connection with presidential election campaigns. The Foundation furthers its goals by conducting original litigation, filing of amicus curiae briefs, participating in administrative proceedings, and engaging in other legal activities. It has appeared as an amicus curiae in a number of cases before this Court, including First Amendment matters. *Widmar v. Vincent*, 454 U.S. 263 (1981). It has also conducted original, precedent-setting litigation to advance First Amendment jurisprudence. *Country Hills Christian Church v. Unified School District No. 512*, 560 F.Supp. 1207 (D. Kan. 1983).

Amicus Houston Political Action Committee, commonly known as HOUPAC, is a political action committee registered with the Federal Election Commission. HOUPAC raises money from voluntary donations to disburse in conjunction with the federal election campaigns in accordance with applicable law. It is thus subject to the limit on independent expenditures imposed by 26 U.S.C. §9012(f), the constitutionality of which is at issue in this case.

SUMMARY OF ARGUMENT

26 U.S.C. §9012(f)—the statute which Appellants sought to have declared constitutional in this case—is clearly unconstitutional under the analysis in *Buckley v. Valeo* pertaining to independent expenditures. Not only has the evidentiary showing to sustain any countervailing interest been wholly insufficient, but it is difficult to imagine any type of showing which would support the extremely severe restrictions imposed by Section 9012(f) on these most fundamental rights of political free speech.

Political free speech is absolutely essential to the functioning of our representative democracy. This has been recognized by this Court in its many decisions emphasizing the role of the "marketplace of ideas" in regulating our public affairs. The right of political free speech in conjunction with electoral campaigns is probably the most central of the "core" protections given by the First Amendment.

This right is not diminished by the mere fact that individuals have associated together to communicate their political views to the public. The First Amendment protects freedom of association in political life as well. Since these rights are at the core of our constitutional system, they are not subject to being "balanced away" except to prevent the most extreme evils, which are certainly not involved in this case.

Buckley v. Valeo itself recognizes that independent expenditures by groups and associations cannot constitutionally be limited. If they could be limited as Section 9012(f) seeks to do, the result would be to grant a monopoly on organized debate to a few privileged groups in presidential campaigns. Therefore, the Motion to Affirm should be granted under Supreme Court Rule 16.1.

ARGUMENT

I. PROTECTION OF CITIZENS' RIGHTS TO ASSOCIATE TOGETHER TO ENGAGE IN POLITICAL FREE SPEECH REGARDING FEDERAL ELECTIONS IS AT THE VERY HEART OF FIRST AMENDMENT GUARANTEES.

The aim of this brief is a relatively modest one. Amici contend that the decision in this case is controlled by *Buckley v. Valeo*, 424 U.S. 1 (1976), and that the $1,000 limitation on independent expenditures imposed by 26 U.S.C. §9012(f) is therefore unconstitutional. *Id.* at 39-59. But amici will not argue the more technical aspects of *Buckley* or of this Court's subsequent decisions construing the federal election laws. Instead, this brief will serve to underline the vital and critical nature of the speech which is threatened by Section 9012(f). That statute clamps a tight lid on political speech and association—long considered by this Court to be at the very heart of our Constitutional system—and does so in connection with the most fundamental of our political procedures, the election of the President.

Often this Court must engage in delicate balancing of interests where First Amendment rights are implicated. This is not such a case. Because of the paramount nature of political expression in connection with the electoral process, any countervailing interest must be powerful indeed to impose even moderate limitations on these rights. In this case, the restriction is severe, and the countervailing interests virtually non-existent. The very scholarly opinion of the District Court demonstrated beyond question that the interest in preventing corruption or the appearance of corruption—even supposing that to be a sufficient reason for imposing such a draconian limitation on speech—had not been demonstrated on the record. *Democratic Party of the United States v. National Conservative Political Action Committee*, Civil Action No. 83-2329, p. 81 (E.D. Pa. 1983). But even a far greater evidentiary showing would not likely suffice to save the statute.

The reason for that conclusion is the crucial nature of political free speech to the functioning of a representative democracy. Perhaps the most eloquent expression of the rationale for free speech in our political system was provided by Justice Brandeis in his concurring opinion in *Whitney v. California*:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that

hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. • • •

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., joined by Holmes, J., concurring) [emphasis added].

Four years later, Chief Justice Hughes recognized that political expression, even when merely symbolic, and even

when expressing opposition to organized government, is still worthy of the highest degree of protection:

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

The special relation of the First Amendment to our political framework was more recently underlined by Justice Harlan:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. *Cohen v. California*, 403 U.S. 15, 24 (1971).

To avoid persecution and tyranny by established majorities, we have staked the future of our political system on the free exchange of ideas. Mr. Justice Holmes gave the principle its classic expression in a now-vindicated dissent when he propounded the proposition "that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which

[citizens'] wishes can be safely carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting). "That at any rate is the theory of our Constitution," he concluded. *Id.* Many other decisions of this Court have emphasized the centrality of the "marketplace of ideas" in our political system. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976) (evaluating whether the challenged ordinance posed a "threat to the free market in ideas and expression"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (concluding that fighting words "are no essential part of any exposition of ideas" and have only slight value as "a step to truth").

Elections for public office are the paradigm of the marketplace of ideas at work. Professor (now Judge) Robert Bork defined "explicitly political speech" as "speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering, and propaganda." Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 28 (1971). Not only is "electioneering" an obvious species of "political" speech, it may be the single most important kind. As this Court stated in a case striking down a libel judgment arising from statements made in a political campaign:

> [If] it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

Indeed, like the right to vote, the right of the citizenry freely to make known facts and opinions regarding candidates may be said to be a "fundamental political right, because preservative of all rights." *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The fundamental importance of this type of political speech cannot be diminished merely because citizens associate with one another in order to make their voices more effective. The right of political association has always been basic in the American political scheme. Tocqueville devoted a chapter to "Political Association in the United States," and included the following observations:

> The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty. Short of attacking society itself, no lawgiver can wish to abolish it.
> * * *
>
> In America the citizens who form the minority associate in the first place to show their numbers and to lessen the moral authority of the majority, and secondly, by stimulating competition, to discover the arguments most likely to make an impression on the majority, for they always hope to draw the majority over to their side and then to exercise power in its name.
>
> Political associations in the United States are therefore peaceful in their objects and legal in the means used; and when they say they only wish to prevail legally, in general, they are telling the truth. A. de Tocqueville, *Democracy in America* 193-94 (G. Lawrence trans. 1969).

The decisions of this Court "establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing belief and ideas is protected by the First and Fourteenth Amendments." *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977); see also *Elrod v. Burns*, 427 U.S. 347 (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). In fact, one recent case has called the right to associate together and to communicate views to the public an "absolute right." *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176 n.10 (1976). In that case, the question before the Court was whether nonunion teachers could address the school board at a public meeting. In holding that they could, the Court stated that:

> Surely no one would question the absolute right of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media. It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views directly to the very decision-making body charged by law with making the choices raised by the contract renewal demands. *Id.*

The right of these teachers to organize and express their views jointly was viewed as an "absolute right" that "no one would question." Would this Court nevertheless have sanctioned a rule or law placing a $1,000 limit on what they could spend to promulgate those views? Cer-

tainly the answer must be that it would not. Such a limit would be even more injurious if placed upon political speech in the context of national elections.

The evils of channelling all political expression into the two major parties, and of suppressing outside voices, was perhaps best stated in *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957). Speaking for the Court, Chief Justice Warren stated that:

> Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channelled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. *Id.*

The fact that individuals have associated together to express their political views does not furnish a basis for suppressing that expression. On the contrary, the injury to their First Amendment rights of free speech is compounded if their freedom of association is also attacked.

The past few decades have seen a dramatic expansion of the range of activities which have been protected by this Court under the First Amendment. As recently as 1942,

this Court was able to state that the prevention and punishment of the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words" have "never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Commercial speech was, at least arguably, beyond the pale of First Amendment protection. *Breard v. Alexandria*, 341 U.S. 622 (1951); *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Yet commercial speech now enjoys a considerable degree of protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976). The "fighting words" exception has been substantially narrowed. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972). The "profane" and the "lewd" have both received protection. *Plummer v. City of Columbus*, 414 U.S. 2 (1973); *Miller v. California*, 413 U.S. 15 (1973). The admittedly libelous is often protected by a constitutional privilege under *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Thus, in extending the shield of the First Amendment, this Court has often had to make refined determinations of where First Amendment interests leave off, and other valid interests begin.

But this cannot be the case when pure political speech, made independently by citizens during the course of campaign, is at stake. Any limitation on such speech "heavily burdens core First Amendment expression." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). There must be a distinction between the "free dissemination of ideas of social and political significance," as in the case at bar, and activities in which there is a "less vital interest." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). Because Section 9012(f) treads heavily on the most vitally important kind of political speech, it cannot be sustained absent the most compelling kind of justification, which is wholly lacking in this case.

II. SECTION 9012(F) IS MANIFESTLY UNCONSTITUTIONAL UNDER BUCKLEY v. VALEO.

Supreme Court Rule 16.1(c) permits the filing of a Motion to Affirm on the ground that "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." Other grounds for a Motion to Affirm may be urged under Rule 16.1(d). While amici are not aware of whether Appellees are proceeding under Rule 16.1(c) or Rule 16.1(d), or both, amici would assert that section 9012(f) is so patently unconstitutional that the Motion to Affirm is grantable, and should be granted, under Rule 16.1(c).

The Court's analysis in *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976) controls this case. There the Court held unconstitutional the $1,000 limitation on independent expenditures imposed by 18 U.S.C. §608(e)(1). It examined whether §608(e)(1) could satisfy "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 44-45. The Court found that it could not. Since identical interests are implicated with respect to §9012(f), that section must fall as well.

Amici have argued above that limitations on expenditures by political committees are constitutionally no different than limitations on expenditures by individuals, since individuals clearly have the right to associate to promulgate their political views. *Buckley* itself recognizes this point. In discussing the expenditure limitations, the Court noted that one of their primary effects "is to restrict the quantity of campaign speech by individuals, *groups*, and candidates." *Id.* at 39 [emphasis added]. In declaring those limits unconstitutional, the Court again stated that they "place substantial and direct restrictions on the ability of candidates, citizens, and *associations* to engage in pro-

tected political expression, restrictions that the First Amendment cannot tolerate." *Id.* at 58-59 [emphasis added]. *Buckley* does not require or permit any different result for §9012(f).

The effect of §9012(f) is to require virtually all discussion of the issues and candidates to be channelled through organized political parties, licensed broadcasters, periodical publications, and certain exempt organizations which can communicate only to their members. All other organized debate is essentially stifled. As this Court has stated in another context "the participation in public discussion of public business cannot be confined to one category of interested individuals." *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175 (1976). Public discussion of our most imperative public business—the election of the President—cannot be confined to the few categories permitted by §9012(f).

CONCLUSION

For the reasons above stated, Appellees' Motion to Affirm should be granted.

Respectfully submitted,

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REPLY

BRIEF

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No. 83-1932

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR APPELLANT

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1032

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR APPELLANT

On January 19, 1982, this Court affirmed, by an equally divided vote, the judgment of a three-judge district court that Congress in enacting the Presidential Election Campaign Fund Act violated the First Amendment by restricting political committees to expenditures of $1,000 to further the election of presidential candidates eligible for public funds, *Common*

Cause v. *Schmitt*, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided court*, 455 U.S. 129 (1982), a judgment which led the Federal Election Commission ("Commission") to conclude that cases involving the challenged provision should continue to be referred to it for enforcement. On March 17, 1983, the National Conservative Political Action Committee ("NCPAC") and the Fund for A Conservative Majority ("FCM"), appellees in this case, urged the Commission to conclude that this Court's affirmance in *Common Cause* v. *Schmitt*, *supra*, rendered the statutory provision unconstitutional and to decide not to enforce the limitation against expenditures the committees intended to incur to further the reelection of Ronald Reagan. The Commission reaffirmed its conclusion that the statutory provision would be violated by the expenditures appellees proposed to make, and declined to conclude that the enactment was an unconstitutional exercise of Congress's power. AO's 1983-10 and 1983-11, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5715, 5716.

The Commission then sought the aid of the special statutory three-judge court to implement or construe the public funding statute, seeking a declaration that the statute prohibited the proposed expenditures, and that it was a constitutional exercise of Congress's power to legislate. On December 12, 1983, that court found that the statute prohibited the proposed expenditures, but declared that it would consider it substantially overbroad and constitutionally unenforceable. In light of this Court's affirmance of *Common Cause* v. *Schmitt*, *supra*, by a 4-4 vote, the issues presented thus remain unresolved. *See Trans World Airlines* v. *Hardison*, 432 U.S. 63, 73 n.8 (1977); *Neil* v. *Biggers*, 409 U.S. 188 (1972); *Ohio*

ex rel. Eaton v. *Price*, 364 U.S. 263, 264 (1960); *Hertz* v. *Woodman*, 218 U.S. 205, 213-14 (1910). *See also Marbury* v. *Madison*, 5 U.S. 137, 178 (1803).

The sanctity of the electoral system by which the executive power of the office of President is transferred is an interest of the highest order. Congress has the power under the Constitution "to preserve the purity of presidential and vice-presidential elections," *Burroughs* v. *United States*, 290 U.S. 534, 544 (1934), against the "two great natural and historical enemies of all republics, open violence and insidious corruption." *Ex Parte Yarbrough*, 110 U.S. 651, 658 (1884). The government cannot and should not await the occurrence of actual corruption of the process before deciding upon prophylactic measures designed to prevent circumstances from appearing which foster the spread of the substantive evil predicted:

> [t]o say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.

Burroughs v. *United States*, 290 U.S. at 545. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976); *FEC* v. *National Right To Work Committee*, 459 U.S. ——, 103 S.Ct. 552, 560-1 (December 13, 1982); *Republican National Committee* v. *FEC*, 487 F. Supp. 280 (S.D.N.Y. 1980), 616 F.2d 1 (2d Cir.) (en banc) (per curiam), *aff'd mem.*, 445 U.S. 955 (1982). *See*

also Ohralik v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978).

This case raises questions of central importance to the power of Congress to regulate federal elections through public financing. Throughout the consideration of public financing of the presidential general election, Congress sought a way to prevent the public grant from becoming a mere subsidy for the candidates of the two major parties (the grant in 1984 will amount to more than $39 million dollars). Congress knew from past experience that unless restrictions to achieve that end reached all political committees formed for the purpose of influencing elections, groups would arise precisely to avoid the limitations. Congress knew from past experience the nexus of improper access resulting from successful private spending and directly limited both the political party and its candidate in their expenditures. Congress knew that if it did not limit private expenditures from committees not responsible to party or candidate, it would not succeed in its aim of promoting the general welfare by making public financing a choice that limited private financing.

Appellees, however, urge this Court to affirm summarily the judgment of the district court, arguing that the overturning of these Congressional judgments presents no issue of importance because this Court, in *Buckley* v. *Valeo*, *supra*, foreclosed the conclusion that Congress could enact such expenditure limitations. This Court has never concluded that the substantive reach of the First Amendment so limits the Congressional power. Rather, it has explicitly concluded that the necessity for campaign finance limitations involves a legislative judgment based on experience, whose balance will be overturned only where the ef-

fort to prevent the appearance of corruption, by failing to protect the opportunity for speech and association, abridges those protected rights. *See Buckley* v. *Valeo*, *supra*; *United States* v. *CIO*, 335 U.S. 106 (1948); *FEC* v. *National Right To Work Committee*, 459 U.S. ——, 103 S.Ct. 552 (December 13, 1982); *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973).

The court below, recognizing that *Buckley* itself upheld both certain expenditure limits and the central terms of the statutory provisions, did not conclude that *Buckley* left Congress without power to regulate the spending of money in publicly financed elections. Rather, it concluded that the Congressional enactment swept too broadly, that the proof before Congress must rise to a higher level of actual *quid pro quos* resulting from the nexus of independent political committees making large expenditures in support of candidates and parties. The decision below thus starkly poses central questions of when the courts should overturn Congressional enactments because they find erroneous the legislative conclusions that Congress reached.

Summary affirmance of the unconstitutionality of a federal statute is rare, precisely because the solemn responsibility of the Court is not to overturn a Congressional judgment as to the wisdom of regulation, unless it contravenes specific constitutional provisions. Summary affirmance of a key provision of a Congressional enactment designed to govern the financing of the general election campaign for our highest national office, a statute not changed in any material aspect since this Court ruled on its constitutionality in 1976, would be anomalous. For the reasons set forth in its Jurisdictional Statement and

here, the Commission urges the Court to accept this case for plenary hearing.

Respectfully submitted,

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APPELLANT'S

BRIEF

Nos. 83-1032 and 83-1122

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

FEDERAL ELECTION COMMISSION,

Appellant

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,

Appellees

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.,

Appellants

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR APPELLANTS DEMOCRATIC PARTY OF THE UNITED STATES AND THE DEMOCRATIC NATIONAL COMMITTEE

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QUESTION PRESENTED FOR REVIEW

Does the First Amendment to the Constitution of the United States preclude Congress from limiting the amount of money that political committees may spend to further the election of publicly financed presidential candidates, where Congress has acted to enhance pertinent First Amendment values and to protect against undue influence and the appearance of undue influence in connection with presidential election campaigns?

STATEMENT PURSUANT TO RULE 24.1(b)

All parties in the proceeding below are listed in the caption of the case in this Court except for Edward Mezvinsky, who was a plaintiff below but is not a party before this Court.

STATEMENT PURSUANT TO RULE 29.1

This Brief on the Merits is filed on behalf of the Democratic Party of the United States and the Democratic National Committee. Neither is a corporation.

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Nos. 93-0642 and 93-0122

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

FEDERAL ELECTION COMMISSION,

Appellant

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,

Appellees

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.,

Appellants

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

BRIEF FOR APPELLANTS DEMOCRATIC PARTY OF THE UNITED STATES AND THE DEMOCRATIC NATIONAL COMMITTEE

OPINION BELOW

The opinion of the three-judge district court is reported at 578 F. Supp. 797, and is set forth in the Appendix to the Jurisdictional Statement.

JURISDICTION

The final judgment of the three-judge panel of the United States District Court for the Eastern District of Pennsylvania was entered on December 12, 1983 and declared a federal statute unconstitutional. The undersigned appellants filed a notice of appeal to this Court in the United States District Court for the Eastern District of Pennsylvania on December 15, 1983. The appellate jurisdiction of this Court is invoked under 26 U.S.C. §9011(b)(2); 28 U.S.C. §1252, and 28 U.S.C. §1253 (1976). The appeal is timely under 28 U.S.C. §2101(a)-(b) 1976).

Appeal in No. 83-1032 was docketed on December 22, 1983. Appeal in No. 83-1122 was docketed on January 6, 1984. This Court noted probable jurisdiction on April 16, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 9012(f) of the Presidential Campaign Fund Act of 1971, 26 U.S.C. §9012(f) 1976):

"(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditure to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

"(2) This subsection shall not apply to (A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting

the news or in taking editorial positions, or (B) expenditures by an organization described in section 501(c) which is exempt from tax under section 501(a) in communicating to its members the views of that organization.

"(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both."

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

After lengthy debate and careful scrutiny, the 92nd Congress passed a comprehensive statute designed to prevent the abuses associated with the financing of presidential election campaigns and to further core First Amendment values. Enacted as the Presidential Election Campaign Fund Act of 1971, 26 U.S.C. §9001, *et seq.* ("The Fund Act"), this statute established a voluntary public alternative to the private financing of presidential election campaigns. Candidates who satisfy the eligibility requirements are entitled to receive public funds to defray their qualified campaign expenses. The acceptance of public funds triggers a variety of interrelated prophylactic measures, including the one at issue in this case, §9012(f). Section 9012(f) limits the amount of money political committees that are not "authorized committees" ("PACs") may expend to further the election of a presidential candidate who accepts public funding. To the extent that these PAC expenditures would be considered qualified campaign expenditures if made by an "authorized committee," §9012(f) limits the PAC expenditures to $1,000.

During the 1979-1980 presidential election cycle, a relatively small group of PACs, in open defiance of section 9012(f), spent millions of dollars to influence the presidential election.[1] These PACs were managed by sophisticated, seasoned, professional political operatives who had numerous and strong ties to official presidential campaigns.[2] The spending by this small group of PACs dominated all independent spending in connection with the 1980 presidential election. For example, just three PACs, the two defendants in this case and one other committee, spent a total of more than $5 million, approximately 40% of all independent expenditures made by political committees, individuals and all other groups to influence the outcome of the 1980 election.[3] In addition, other PACs spent additional millions to influence the 1980 presidential election.[4] The importance of these private expenditures is apparent given that the total public grant to each candidate in 1980 was less than $30 million.[5]

1. Joint Appendix at 47-52
2. Joint Appendix at 30-47, 53-56
3. Joint Appendix at 45, 49, 50-52
4. Joint Appendix at 40-47, 52

In continued defiance of the law, many of these same PACs have publicly announced their intention to spend, and have begun to spend, even greater sums to influence the outcome of the 1984 election.

The Democratic National Committee and the Democratic Party of the United States brought a declaratory judgment action in District Court for the Eastern District of Pennsylvania seeking a declaration that, as applied to the appellees, §9012(f) was constitutional. The Federal Election Commission ("FEC") joined in this effort.

The District Court found that Congress had enacted section 9012(f) for the constitutionally permissible purpose of curbing both actual corruption and the appearance of corruption arising out of the infusion of substantial sums of private money into presidential campaigns.[6] The District Court also found that "[u]ncontroverted and admissible evidence shows that 70% of the independent expenditures made in the 1980 campaign were by political committees whose aggregate expenditures exceeded $1,000,000."[7] The District Court acknowledged that "extremely large and professionally managed expenditures made independently of the candidate's official campaign may create the appearance of corruption."[8] Despite these findings, the District Court held section 9012(f) to be unconstitutionally overbroad.[9]

5. Joint Appendix at 58
6. *Democratic Party v. Nat'l Conservative Political Action Committee*, Appendix to the Jurisdictional Statement of the Democratic Party of the United States and the Democratic National Committee ("DJS Appendix") at A-1.
7. *Id.* at A-94
8. *Id.* at A-31
9. *Id.*

SUMMARY OF ARGUMENT

The District Court erred in failing to give sufficient weight to legislative judgments concerning the need to regulate the conduct of federal elections. The Presidential Campaign Fund Act of 1971 was enacted in order to minimize undue influence and the appearance of undue influence in Presidential campaigns and to further First Amendment values. An integral element of the public funding scheme was the limiting of financial support that political committees could provide to those candidates who chose to accept public financing. Congress acted in an area in which it has particular and unique expertise and its judgments are entitled to great weight and deference by this Court.

It has already been determined by this Court in *Buckley v. Valeo* that the Fund Act was designed to and has the effect of furthering First Amendment values. These positive First Amendment effects weigh heavily in assessing whatever restrictions section 9012.f may place on the speech rights of the PAC's. Section 9012.f does not limit the speech of individuals or groups of individuals, but rather applies neutrally to one peculiar type of organizational form, the PAC, which Congress found to pose special dangers. Section 9012.f, moreover, does not place any limit on total speech. It encourages, rather than diminishes, core First Amendment values and should be upheld on that basis alone.

In addition, section 9012.f is a narrowly tailored device to ensure against the potential for, or appearance of, the undue influence which inevitably flows from injecting large amounts of [illegible] money into federal elections. The essential interest in preserving public confidence in the electoral process also strongly favors upholding this statute.

Historical experience since the passage of section 9012.f indicates that Congress was correct. Political action committees are an increasingly [illegible] phenomenon. There can be no doubt that they do [illegible] the judgment of Congress in this area, [illegible] of federal elections, [illegible] has special experience and expertise, should not be [illegible].

ARGUMENT

I. Section 9012.f Is Presumptively Valid.

All federal statutes, including those regulating speech and association, are presumptively valid.[10] As this Court has noted, the mere fact that claims are cast "under the umbrella of the First Amendment" should not cause judges to ignore or undervalue the judgment of the legislative branch.[11] "[W]hen we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem."[12]

The presumption in favor of the validity of a statute is especially strong in areas, such as the conduct of federal elections, where Congress has particular expertise and experience.[13] Where Congress has, in addition, carefully considered the precise constitutional question presented to the Court, its judgments are entitled to even greater weight.[14]

While the Fund Act was under consideration in Congress, Senator Taft proposed to amend section 9012.f, which was drafted to limit the activity of only one special organizational form, the PAC, to make the provision more expansive and comprehensive. Senator Taft proposed the amendment in an effort to further the goal of preventing the undue influence or the appearance of undue influence which results from infusions of private, special interest money into presidential election campaigns. The Taft Amendment would have deleted the term "political committee" and substituted the phrase "[a]ny corporation, labor organization, partnership, association, political committee, political education committee, or any other committee."[15] Other members of Congress opposed the change on the

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10. Flemming v. Nestor, 363 U.S. 603, 617 (1960).
11. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 103 (1973).
12. *Id.* at 103.
13. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946); Federal Communications Commission v. National Right To Work Committee, 459 U.S. 197, 209.
14. Buckley v. Valeo, 424 U.S. 1, 57-58, 67 (1976).
15. 117 Cong. Rec. 43,380 (1971).

grounds that, while it would further the goal of preventing undue influence on the appearance thereof, it might interfere unduly with the exercise of First Amendments rights. In particular, there were concerns that such a sweeping provision might stifle the expression of "personal opinion" and the ability of groups of individuals to pool their resources to do such things as hire a hall to hold a mass meeting.[16] Cognizant of its constitutional responsibility to balance First Amendment values against the goal of protecting the integrity of the presidential election process, the Senate defeated the Taft Amendment.

As enacted, section 9012(f)[17] restricts the activities of only one very narrow, but potentially corrosive, form of aggregated wealth, the PAC. Section 9012(f) does not restrict individuals. The word "individual" does not even appear in the provision. Nor does Section 9012(f) restrict groups of individuals. In fact, as noted above, Congress deliberately excluded individuals, groups of individuals and all entities other than PACs from the scope of 9012(f).

Faced with a complex problem with many hard questions and few easy answers, Congress made the judgment that this narrowly-tailored measure affecting a single organizational form was constitutionally proper and societally necessary. That judgment is entitled to great weight and a heavy presumption of validity.

16. 117 Cong. Rec. 43673.

17. 26 U.S.C. 9012(f) provides in relevant part that

> It shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to make expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000

II. The Fund Act, Including Section 9012(f), Enhances, Rather Than Diminishes, Pertinent First Amendment Values.

A. First Amendment Rights Of The PACs Should Be Balanced With Other Conflicting And Competing First Amendment Values

It is well-established that First Amendment rights are not absolute.[18] Competing claims and interests must be balanced to ensure that the regular work of government is not crippled,[19] and that the very principles that the First Amendment seeks to protect are not turned into a "mocking phrase."[20] As a result, even "significant interference" with First Amendment freedoms "may be sustained if the State demonstrates a sufficiently important interest."[21]

If it is true that even a "significant interference" with First Amendment values is justified when Congress properly balances those values against other competing constitutional needs, then it must also be true that Congress is justified when, faced with conflicting and competing intra-First Amendment values, it strikes a proper balance among them.

The deference to be given to a legislative judgment with respect to such balancing is especially warranted where the legislature has balanced conflicting and competing First Amendment claims in a manner that not only is neutral and places no limit on the total amount of political speech,[22] but also enhances the First Amendment rights of the general public. That is precisely what the 92nd Congress did in enacting the Fund Act and section 9012(f).[23]

18. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 209 (1982); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 567 (1973).

19. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102-103.

20. *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Frankfurter, J., concurring).

21. *Buckley v. Valeo*, 424 U.S. at 25.

22. Cf. *Buckley v. Valeo*, 424 U.S. at 19 n. 17.

23. See *Buckley v. Valeo*, 424 U.S. at 91.

B. Public Funding Furthers Protected Speech.

The process of raising money for presidential campaigns from private sources tends inherently to inhibit candidates' exercise of their First Amendment rights. The "unfettered interchange of ideas for the bringing about of political and social changes desired by the people,"[24] and the "free discussion of governmental affairs,"[25] core First Amendment values, naturally tend to be subordinated to the real and immediate need to raise money for the campaign. Recognizing the problems inherent in increasingly expensive, privately financed, presidential campaigns, Congress enacted a comprehensive, optional program for public funding of those campaigns.

The provision for public funding is generous. In 1980, the candidates of the Republican and Democratic parties each received nearly 30 million dollars in public campaign funds. The amount in 1984 will be closer to 40 million dollars. Congress did not intend that these public resources serve as a mere financial cushion, a lure to which the candidates could add, and eventually would be forced to add, private funds.[26] They were to be a complete alternative to private financing.[27] Public funds were intended to free the candidates from dependence on special interests and to free candidates to devote their resources not to fundraising, but to the campaign.

Freed from the need to spend much of the campaign raising funds, candidates can use their time and energy to engage in core First Amendment activity, the formulation and communication of ideas to the electorate. As important, if not more important, freed from the need to tailor and restrict their speech to meet the approval of potential financial backers, candidates are far more likely to engage in "uninhibited, robust and wide-open"[28] public debate concerning the issues facing the nation.

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24. *Roth v. United States*, 354 U.S. 476, 484 (1957).
25. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).
26. 117 Cong. Rec. 41790 (1971) (remarks of Sen. Hart).
27. 117 Cong. Rec. 41779 (1971).
28. *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964).

This emancipation from the bondage of the dollar[29] "furthers, not abridges, pertinent First Amendment values."[30]

Section 9012(f) is an essential, integral element in the overall statutory scheme. The danger of which Congress was so wary, PAC spending to influence the outcome of presidential elections, has already soared into the tens of millions of dollars and will, unless stopped, continue to go even higher. During the 1984 presidential election cycle, PAC spending in support of individual presidential candidates will approach, if not exceed, 50% of the total public funding received by the candidate. At this rate, it is reasonable to expect that some candidates may soon receive greater financial support from PACs than they do from public funding.

As a result of this increase in the ability of PACs to influence the outcome of presidential elections, it is inevitable that enormous pressure will build on candidates to spend time and energy cultivating this new, rich and powerful source of campaign support. Further, the temptation will grow to fashion the expression of ideas in a way calculated to benefit from the power which has accumulated in these organizations. Once candidates begin to expend energy on this new type of fundraising and begin to limit their speech to maximize this potential source of revenue, the enhancement of pertinent First Amendment values resulting from the Final Act will cease.

Thus, without section 9012(f), the congressional purpose behind public funding, freeing candidates from the need to cultivate and kowtow to private sources of financial support, is likely to be frustrated. With that frustration will come a diminution of values central to the First Amendment.

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29. "To put it bluntly, some form of public financing is the only way to put an end to the days of labor's man or industry's man or whatever else's man whether that man aspires to reside in the White House or whether he seeks the post of county prosecutor. It makes no difference. Under this amendment he would be the people's man." 117 Cong. Rec. 41810 (1971) (remarks of Sen. Mansfield).
30. *Buckley v. Valeo*, 424 U.S. at 93.

C. Section 9012(f) Is Neutral

This Court consistently has upheld statutes that are designed to, and have the effect of, enhancing First Amendment values enjoyed by the general public.[31] So long as the enactment is neutral both as to the content of speech and those who may speak, the Congress should be afforded substantial deference. As Justice Frankfurter explained:

> "So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose. . . ."[32]

Section 9012(f) is precisely such a neutral provision. It does not in the name of reform seek to "restrict the speech of some elements of our society in order to enhance the relative voice of others,"[33] or foreclose or regulate the specific content of speech. For example, nothing in section 9012(f) restricts the independent expenditures of wealthy individuals to equal those of poor or middle-class individuals.[34] The provision applies equally to liberal and conservative, black and white, rural and urban, rich and poor, North and South, and makes no attempt to prescribe what ideas may be expressed.

D. Section 9012(f) Places No Restrictions Of Any Type On The First Amendment Rights Of Individuals Or Groups Of Individuals

As a first step in the process of balancing the enhancement of First Amendment values enjoyed by the people against the

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31 *See Buckley v. Valeo*, 424 U.S. at 91 n. 127; *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

32 *Konigsberg v. Cooper*, 339 U.S. at 52 (Frankfurter J., concurring); *See also Braunfeld v. Oklahoma*, 611 U.S. 601, 616 (1973).

33 *See Buckley v. Valeo*, 424 U.S. at 48-49; *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California*, 454 U.S. 290, 295 (1981).

34 *Compare Buckley v. Valeo*, 424 U.S. 1 (1976)

dollar limitations imposed by section 9012(f) on PACs, it is necessary to identify with precision what it is that section 9012(f) limits. In fact, it does nothing more than limit to $1,000 expenditures in support of a publicly financed candidate by that unique organizational creature, the PAC.

Section 9012(f) does not affect the rights of individuals or groups of individuals. It does not limit the amount of money individuals or groups may give to PACs, nor does it limit their freedom to expend whatever they wish in order independently to express their support for a presidential candidate.

Throughout this litigation and in the earlier case of *Common Cause v. Schmitt*,[35] the defendant PACs have attempted to equate their First Amendment rights with those of their contributors. In essence, they claim that they are merely conduits for the speech of their contributors. But the contention that PACs are mere conduits for their contributors' speech has already been rejected as "untenable," because "sympathy of interests alone does not convert [a PAC's] speech into that of [a contributor]."[36] "While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."[37]

The conduit argument thus rests on a fundamental misconception about the nature of the "proxy speech" accomplished by means of contributions. As this Court explained in *Buckley v. Valeo*, speech in the form of a contribution is merely symbolic. The contributor by the act of contributing does not deliver a specific message, rather he merely states in a general way his support for an individual or organization, or more probably for some aspect of a program associated with that individual or organization. The contribution "does not communicate the underlying basis for the support."[38]

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35 *Common Cause v. Schmitt*, 512 F. Supp. 489, 513 n.6 (1980), *affd mem. for an equally divided court*, 455 U.S. 129 (1982).

36 *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 196 (1981).

37 *Buckley v. Valeo*, 424 U.S. at 21.

38 *Buckley v. Valeo*, 424 U.S. at 21.

Section 9012(f) imposes no limitations on this type of "conduit" speech. It leaves contributors completely free to exercise their First Amendment right to contribute to PACs and then "earmark-ally" to voice their support for those groups. That is as much as the general and symbolic nature of speech by contributors would permit them to do even if section 9012(f) did not exist.

C. The Contention That PACs Are Necessary To Pool The Resources Of Their Contributors Is Specious

1. *"Political Committees" By Definition Cannot Pool*

In an effort to equate the rights of individuals who send money to PACs with those of the PACs themselves, the defendant PACs have argued in the past that they are mere pooling agents, which do nothing more than amplify by aggregation the speech of individuals. But the concept of pooling implies that control remains with those who put their money into the pool. It implies that the speech that ultimately is uttered is that of the contributor. If, however, decisions over the content, timing and subject of the messages produced are not those of the contributor, but rather are vested in the PAC, there is no pooling of speech, but only the aggregation of contributions.

An organization is a "political committee" for purposes of section 9012(f) if its purpose is the solicitation from the public of funds to be used to influence the outcome of a particular election, even if those contributing the funds do not in fact "control" how the funds[59] Thus, for definitional purposes, groups whose members control the use of those funds are not "political committees" under section 9012(f).[60]

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59 See, e.g., Federal Election Commission Advisory Opinion 1980-120, 1 Fed. Elec. Camp. Fin. Guide ¶ 5182 ("[E]ach of the [PAC's] 10 Fed. Elec. Camp. Fin. Guide ¶ 5215; [FEC Advisory Opinion 1980-106, 1 Fed. Elec. Camp. Fin. Guide ¶ 5182 ("[the]

60 See 117 Cong. Rec. 43,381 (1971) (remarks of Senator Mansfield); [illegible] Times, June 11, 1971, at 15, col. 5, reported in 117 Cong. Rec. 43,778 (1971); 117 Cong. Rec. 43,626 (1971).

When PACs do engage in true pooling, then section 9012(f) would be of no concern to them, because it would not apply to their activities. Congress carefully and narrowly drafted this provision to exclude those groups of individuals who come together jointly to exercise their First Amendment right to, for example, hire a hall for political gatherings.[61] Pooling agents, whose members are the owners of all funds and who retain control over those funds, are not included in the definition of political committees.[62] Only by assuming control over the funds and by coordinating the general and symbolic speech of thousands of different contributors into the mass speech, favored, purposeful political message does the PAC become itself within the strictures of section 9012(f).

2. *Independent "Political Committees" Do Not Pool*

Even the most cursory investigation of the defendant PACs' modus operandi reveals that in fact, as well as law, they do not act as a mere conduit for the speech of their contributors. They are rather

61 Cong. Rec. 43,626 (1971).

62 See Board of Governors, Supra, 329 U.S. 463, 469 (1947) ("the reference seems to establish that Congress by the words it chose marked a distinction which we should not obliterate.")

63 Brief, supra, at 25-28.

64 Brief, supra, at 40; see generally Brief, supra, at 37-38.

In soliciting contributions, NCPAC often refers to the urgent need for funds to carry out specific projects, for example to influence voters in a critical state, or conduct a media campaign in favor of this or that candidate. Nonetheless, all funds raised in these and other solicitations go into a single, general, undifferentiated fund. No contributions are earmarked for special purposes and spending is entirely within the discretion of the board of NCPAC. There is not even a guarantee that the money will be used in connection with a federal election, since NCPAC expends funds to influence state and local elections as well.[45]

All decisions made by NCPAC concerning which candidates to support or oppose, the manner of expressing that support or opposition, and the amounts of money to be allocated for that support or opposition are made by NCPAC's Chairman John T. Dolan and the other two members of its Board of Directors.[46]

Despite the fact that the entire three person Board of Directors of NCPAC is empowered to make decisions, during the 1980 presidential election, the Board did not make any decisions concerning campaign strategy or day-to-day expenditures.[47] In fact, it has been reported that Chairman Dolan has stated that the Board of Directors only does whatever is necessary to keep the organization legal by fulfilling certain nominal responsibilities set out in NCPAC's by-laws, such as holding an annual meeting.[48] In an important sense, NCPAC is one person and one person only, John T. Dolan.[49]

Instead of the "pooling" of individual speech, there is only the aggregation of large sums of money by means of sophisticated, direct mail, computer-assisted, fundraising tactics. All of

45. Joint Appendix at 25.

46. Joint Appendix at 26-28. Fund for a Conservative Majority ("FCM"), the other defendant in this case, is almost identical in structure and operation to NCPAC. Like NCPAC, it is dominated by one person, or at the most, a handful of people. Joint Appendix at 29-30.

47. Joint Appendix at 27.

48. Joint Appendix at 27.

49. *See also* Joint Appendix at 27-28.

the power and influence of that collected wealth is then used primarily to amplify the speech of a single individual.

3. *Large Sums Of Money Are Not Required To Gain Access To The Media*

In *Common Cause v. Schmitt*, the District Court made the assumption that PACs were needed in order to collect large sums of money, that large sums of money were necessary to gain access to the media and that without such access provided by the PAC an individual citizen would have no effective means of communication. This assumption was and is wrong for at least two reasons. First, as discussed above, the message conveyed by the PAC is not the speech of its contributors. Second, it is not true that large sums of money are required to gain access to media.

The record in this case makes it clear that access to the media is widely available in this country at relatively modest cost, even in the largest metropolitan areas and the most densely populated regions. The average cost of sixty seconds of radio time in the heavily industrialized states within the jurisdiction of the United States Court of Appeals for the Third Court ranges from $15 to $20 in the Scranton-Wilkes-Barre region to $125 in Philadelphia, the fourth largest metropolitan area in the United States.[50]

In significant mid-sized cities in the region, such as Binghamton-Elmira, New York, Reading, Pennsylvania and Trenton and Atlantic City, New Jersey, the average cost of sixty seconds of radio time varies between $20 and $30.[51] Television, naturally, is more expensive. But even in Philadelphia, a thirty second television spot on a UHF channel can be purchased for approximately $50,[52] and the average cost of thirty seconds of time on the VHF channel, Channel 3, during NBC's morning news program, The Today Show, is only $450.[53] Similarly, the cost of purchasing newspaper space is within reach of most average citi-

50. Joint Appendix at 60.

51. Joint Appendix at 60.

52. Joint Appendix at 60.

53. Joint Appendix at 61.

zens. In Pennsylvania the per agate line charges are $.41 in the *Easton Star-Democrat*, $.45 in the *Hazelton-Standard Speaker*, $.74 in the *Lancaster Journal*, $.99 in the *Harrisburg Patriot News* and $1.02 in the *Scranton Times*.[34] In New Jersey, the per agate line charge for the *Atlantic City Press* is $1.03 and for the *Camden Courier Post* $2.02.[35] Even in large circulation metropolitan dailies, such as *The Philadelphia Inquirer* and *The Philadelphia Daily News*, the cost of purchasing newspaper space is far from prohibitive.[36]

For those individuals who do not have the personal resources to purchase an entire television spot or an appropriate amount of newspaper space, section 9012(f) permits them to group together and pool their resources to accomplish their common goals. The legislative history of section 9012(f) makes it clear that not only is such collective activity not prohibited, but that Congress carefully drafted the provision to ensure that it would be permitted. Senator Pastore's objection to Senator Taft's unsuccessful attempt to expand the language and coverage of section 9012(f) was precisely that Congress should not interfere with the ability of groups of individuals to pool their resources for the purpose of political expression.[37] It was not pooling, but PACs, that Congress restricted.

4. *Section 9012(f) Does Not Foreclose Effective Speech*

Even if one were to accept the PACs' assertions that section 9012(f) makes it more difficult for individuals and groups to gain access to some media, there is no reason to believe that the result would be less speech, or less effective speech, or less meaningful speech. It is true that a political message composed by a single individual and published in a newspaper in Keokuk, Iowa or Sparta, North Carolina is likely to have less impact on a presidential election than a full-page, professionally-produced, advertisement printed in the *Los Angeles Times*. However, that is

34. Joint Appendix at 62-63.
35. Joint Appendix at 62.
36. Joint Appendix at 61-62.
37. See 117 Cong. Rec. 42198-99, 42201, 42626 (1971).

an improper comparison. The proper comparison is between the impact created by a thousand different twenty-dollar messages in various forms of media in various locations all across the country and that resulting from a single twenty-thousand dollar message in one location in one form of media. From the standpoint of the First Amendment, there is no reason to believe that fewer and louder voices produce more meaningful and effective speech.[38]

This total lack of evidence cannot be overcome by noting that highly centralized organizations like corporations generally choose to speak through national media campaigns. That fact reflects the limits of these institutions, rather than some fundamental truth about effective political speech. The difficulty and cost involved in identifying thousands of appropriate local media instruments across the nation and then placing advertisements in those varied and diverse instruments are generally too great to permit such an approach, even if it would reach more people, more persuasively. Organizations with greater options and better local contacts, such as the Republican National Committee, have recognized that local grassroots activity and speech are of vital importance.

Thousands of independent messages are, in any event, of greater First Amendment value than cloned, Madison Avenue, political announcements produced by a PAC. The constitution protects speech in an effort to guarantee the freedom of thought without which there can be no free society.[39] It attempts to create an atmosphere conducive to fostering the core value of the First Amendment — the "unfettered interchange of ideas for

38. The relative electoral fortunes of John Connally, whose well-financed campaign for the Republican presidential nomination in 1980 produced virtually no delegates, and Jesse Jackson, whose relatively underfinanced campaign garnered a significant number of delegates for the 1984 Democratic nomination, raises doubts concerning facile equations of money and effective political speech. It certainly suggests that it would be unwise for the Court to strike down a carefully-drawn statute on the grounds that it forecloses meaningful speech when there is absolutely no record evidence that meaningful speech has been foreclosed.

39. *Kovacs v. Cooper*, 336 U.S. at 97 (Frankfurter, J., concurring).

the bringing about of political and social changes desired by the people"[60] and the "free discussion of government affairs . . . includ[ing] discussions of candidates."[61] The greater the number of speakers, the more direct the speech, the closer American society comes to realizing the unfettered interchange promise of the First Amendment. Far from frustrating the Constitution, section 9012(f) promotes its fulfillment.

Proxy speech, in contrast, does not further interchange. It both reduces the number of voices and cedes to others the right to think and speak. Section 9012(f) does not limit the opportunity for vigorous and untrammelled individual speech. There certainly has been no showing that the enforcement of section 9012(f) will result in less effective or less valuable speech. In fact, since PAC speech is not the speech of the contributor and section 9012(f) will not foreclose media access for the average citizen, there is no evidentiary basis to rebut the presumptive constitutional validity of section 9012(f).

F. Congress Correctly Balanced The Competing First Amendments Claims

Section 9012(f) does not limit total speech. It puts no cap on the amount that individuals or groups of individuals can expend in independent advocacy. The rights of individuals to contribute to PACs are left entirely unaffected by section 9012(f).

Even if one were to assume that any restriction, no matter how slight and indirect, will have some effect on those whose interest in supporting a candidate is only marginal, the impact of section 9012(f) is to enhance rather than diminish First Amendment values. To the degree that individuals will decide to speak directly to their fellow citizens through a political message, rather than symbolically to support a PAC through a contribution, the effect will be more diverse speech. The interchange of ideas will be richer, freer, and less filtered. Such discussion, reflecting the thoughts, concerns and ideas of the entire citizenry,

60. *Roth v. United States*, 354 U.S. at 484.
61. *Mills v. Alabama*, 384 U.S. at 218.

rather than the Madison Avenue-amplified voices of a small group of people, is at the core of the speech that the First Amendment was intended to protect. Given the enhancement of First Amendment values achieved by freeing candidates from dependence on private money and the fact that section 9012(f) impacts on individuals and groups, if at all, only in a way that furthers First Amendment values, the Fund Act, viewed as a whole, including section 9012(f):

> "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [it] furthers, not abridges, pertinent First Amendment values."[62]

The balance between the furthering of First Amendment values that results from public funding and any diminution of those values related to the restriction that section 9012(f) places on that unique organism, the PAC, tips solidly in favor of the Fund Act. The Congressional judgment on this issue, that section 9012(f) is not an impermissible intrusion on First Amendment values, should be respected.

III. Even If Section 9012(f) Is Found, After Balancing The Competing First Amendment Values, To Intrude Impermissibly On The First Amendment, It Is Justified By The Compelling Governmental Interests Of Preventing Undue Influence And the Appearance of Undue Influence

This Court has held repeatedly that even basic constitutional rights may be limited where the purposes of the limitation are sufficient to justify the regulation at issue.[63] "Neither the

62. *Buckley v. Valeo*, 424 U.S. at 92-93.
63. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 206-207.

right to associate nor the right to participate in political activities is absolute."[64]

Congress has the authority to limit and channel speech and association, provided that it acts to further "important," "compelling" or "paramount" public purposes.[65] As this Court has emphasized, the process of reconciling these public needs and protected freedoms is one of careful balancing in which the strength of the government's interest, the degree and nature of the restriction, and the strength of the claimed First Amendment right must all be weighed.[66]

> "Once we get away from the bare words of the [First] Amendment, we must construe it as part of the Constitution which creates a government for the purpose of performing several very important tasks. The [First] Amendment should be interpreted so as not to cripple the regular work of the government."[67]

The constitutional power at stake in this case is the authority to regulate federal elections. Fifty years ago, this Court recognized that Congress has broad power to legislate in connection with elections for President and Vice President,[68] and it repeatedly has reaffirmed that position.[69] Within the general field of regulation of federal elections, this Court has further rec-

64. *Civil Service Commission v. Letter Carriers*, 413 U.S. at 567, quoted in *Buckley v. Valeo*, 424 U.S. at 25, and *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 207.

65. *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530, 535 (1980). *See also, Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982); *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981); *Buckley v. Valeo*, 424 U.S. at 25; *Civil Service Commission v. Letter Carriers*, 413 U.S. at 567.

66. *See e.g., Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

67. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 103, quoting 2 Z. Chafee, Government and Mass Communications 640-641 (1947).

68. *Burroughs v. United States*, 290 U.S. 534 (1934).

69. *See, e.g., Buckley v. Valeo*, 424 U.S. at 13; *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 207.

ognized that one of the purposes that is sufficiently compelling to justify placing limits on speech is the attempt to prevent the corrosive effects of "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization."[70] The corrosive effects have been given different names in different contexts, "corruption," "appearance of corruption," "creation of political debts," but what they each involve is the attempt to gain undue influence through spending in support of political candidates. Regulations which attempt to control the problems associated with the effect of substantial aggregations of wealth are constitutional if narrowly tailored.[71]

This Court has accorded great deference to Congress in its attempts to deal with the problem of undue influence.

> "[W]e accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[72]

This deference is a recognition of the fact that the potential for, and appearance of, undue influence is an exceptionally difficult problem to define and combat. Whatever line is drawn, whether it is an expenditure limit of $1,000 or $100,000, or a regulation applying to political committees but not some other organizational form, it will always be open to debate. This Court, therefore, has wisely and consistently refused to substitute its judgment for that of the legislative branch.[73]

70. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 207.

71. *Id.* at 208.

72. *Id.* at 210.

73. *See Id.* at 210.

A. *Federal Election Commission v. National Right to Work Committee* Controls This Case

In the recent case of *Federal Election Commission v. National Right to Work Committee*, this Court upheld the restrictions contained in 2 U.S.C. §441b on the expenditure of funds by corporations to solicit contributions in connection with federal elections. While that case involved a different statute, it presents constitutional issues identical to those raised in this case.[74]

The National Right to Work Committee ("NRWC") and NCPAC are very similar organizations.[75] NRWC is a memberless, nonprofit corporation without capital stock, organized under the laws of the Commonwealth of Virginia. Its purposes are ideological.[76] NCPAC is a nonprofit corporation formed under the laws of the District of Columbia.[77] Like NRWC, it has no members and its purposes are ideological.[78] NCPAC is organized primarily for the purpose of influencing elections.[79] NRWC carries out its direct election activities through the Employees Rights Campaign Committee.[80] Both organizations attempt to fund their efforts by raising money from the general public by soliciting contributions from persons

74. Absent the provisions of the election laws and the regulations thereunder which permit political committees to take on certain characteristics of corporations, such as limited liability, without subjecting them to all of the regulations applicable to other types of corporations, NCPAC would be a corporation within the meaning of 441(b). See 11 C.F.R. §114.12.

In essence, the defendant PACs assert that they have the right to take advantage of those provisions of the election laws that grant certain advantages to the organizational form "political committee," but are not required to accept the limitations which Congress placed on that form.

75. FCM is in all material respects structurally identical to NCPAC. See Joint Appendix at 28-30.

76. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 199-200.

77. Joint Appendix at 24.

78. Joint Appendix at 24-25.

79. Joint Appendix at 25.

80. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 200.

tions from persons known or hoped to be sympathetic with the general goals and aims of the organizations.[81]

Those who contribute to NRWC and NCPAC play no part in the operation or administration of these corporations.[82] No corporate official of either organization is elected by the contributors.[83] Contributors to NRWC and NCPAC have no say over how their contributions are spent.[84]

Both *Federal Election Commission v. National Right to Work Committee* and this case involve First Amendment challenges to provisions of the federal election laws which limit expenditures and are designed to protect against the same evils. The chief purpose of section 441(b)

> "is to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts. . . ."[85]

It is an attempt to "prevent both actual and apparent corruption" and "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."[86] Section 9012(f) represents a legislative judgment that the aggregation of wealth in political committees, in this case also in corporate form, requires regulation to prevent corruption, the appearance of corruption and the wholesale evasion of the plan for public funding of Presidential elections.[87]

81. Compare Joint Appendix at 25 with *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 200.

82. Compare Joint Appendix at 27 with *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 206.

83. *Id.*

84. Compare Joint Appendix at 26-28 with *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 200-207.

85. *Federal Election Commission v. National Right to Work Committee*, 459 F.2d at 207.

85. *Id.* at 209-210.

86. *Id.* at 209-210.

87. 117 Cong. Rec. at 41779, 41780, 41938, 42397, 42398. See also 117 Cong. Rec. S19151 (daily ed. November 19, 1971) (remarks of Sen. Taft).

To the extent any differences exist between the NRWC situation and the instant one, they are constitutionally insubstantial and, if anything, demonstrate the constitutionality of 9012(f). For example, the nature and extent of the prophylactic measures designed to deal with the feared evil of corruption does differ somewhat in the two statutes. However, the restriction contained in the relevant statutory provision in *Federal Election Commission v. National Right to Work Committee*, 2 U.S.C. §441b (b)(4)(c), is broader and more intrusive of First Amendment rights than that which 9012(f) provides. Section 441(b) mandates a *total* prohibition of *all* expenditures involved in soliciting non-members of the corporation in connection with a federal election. Section 9012(f), on the other hand, merely puts a cap on the amount of expenditures made by political action committees to further the election of a presidential candidate. There are also differences in the size and power of the two organizations which were defendants in the suits. However, it is NCPAC that is considerably more successful than NRWC, raising in excess of three million dollars during 1975-76 in comparison to the $77,000 received in response to NRWC's 1976 solicitation.[88] Differences such as these are not of constitutional dimension and would, in any case, lead to the conclusion that the more narrowly drawn limitations in section 9012(f) are even stronger reasons for upholding the constitutionality of section 9012(f) than those found sufficient to sustain section 441(b).

The Court below strained to distinguish *National Right to Work Committee* on the ground that it dealt with "corporations, a creature of positive law that has traditionally been treated as sui generis."[89] This Court has never taken such a mechanical approach to the complex problems associated with the regulation of elections. To the contrary, this Court has made crystal clear that " 'differing structures and purposes' of different entities

88. Compare Joint Appendix at 47 with *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 200.

89. *Democratic Party v. National Conservative Political Action Committee*, DJS Appendix at A-49.

'may require different forms of regulation in order to protect the integrity of the electoral process.' "[90]

Congress determined that public funding of Presidential election campaigns was necessary to safeguard the integrity of, and the public's confidence in, the presidential electoral process. Congress also determined that the public funding program and all the purposes behind it would be endangered if the "subterfuge" of PACs could be employed to evade the purposes of the law.[91] To hold that Congress was not entitled to make these judgments merely because PACs are a relatively new form of aggregated wealth and economic power, and because the history of abuse by PACs is shorter than that of other corporate forms, would be absurd. It would be to require, as a matter of constitutional law, that Congress could construct a defense only against the depredations of the past, a Maginot line against yesterday's challenges, rather than an effective shield against the evils of this new age.

It is, moreover, far from clear that the PAC's are in any real sense new, rather than just the most recent manifestation of the "factions" that James Madison characterized as the "dangerous vice" of popular governments.[92] Madison realized that factions could not be eliminated, but argued that the health of the Republic required that their efforts be controlled. "The regulation of these various and interfering interests forms the principal task of modern legislation. . . ."[93] The Republic has changed, the means of communication have changed, but this basic challenge has remained constant. In placing section 9012(f)'s narrow limits on PAC's, Congress responded carefully and cautiously, as the Founding Fathers recognized that the legislature should, to the dangers of our contemporary factions, the PACs.

90. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 210, quoting *California Medical Association v. FEC*, 453 U.S. at 201.

91. 117 Cong. Rec. 42387 (1971); 117 Cong. Rec. S19131 (daily ed. Nov. 19, 1971) (remarks of Sen. Taft).

92. *The Federalist*, No. 10, at 104, Nov. 24, 1787.

93. *The Federalist*, No. 10, at 107, Nov. 24, 1787.

B. There Is A Solid Basis For The Congressional Determination That PACs Create A Danger of Undue Influence And The Appearance of Undue Influence

1. *There Have Been And Are Close Links Between PACs and Official Presidential Election Campaigns*

There are very close links and there have been frequent movements between the professional staffs of PACs and those of official presidential election campaigns and even of administrations. To cite a few examples, Frank Donatelli, a founder of NCPAC, and a former member of the board of FCM, was Midwest coordinator for an authorized presidential election campaign in 1980.[94] NCPAC's chairman Dolan's brother was a staff member of a presidential campaign in 1980 and worked in that candidate's administration when it came to power.[95] Dolan himself was, in 1980, a business partner in a joint venture with Lyn Nofziger, an official in a presidential campaign and later Assistant to the President for Political Affairs.[96] Roger Stone, another of NCPAC's founders and its original treasurer, was Northeast coordinator for a 1980 presidential campaign.[97]

In addition, these PACs purchased professional and campaign services from the same vendors as did the official presidential election campaigns. Arthur J. Finkelstein and Associates conducted polls for NCPAC, FCM and for an official presidential campaign.[98] Americans For An Effective Presidency, another PAC, used the same advertising agency as did the official election campaign for one of the candidates in 1976.[99] Ed Nichols Associates, a direct mail firm, performed services during 1980 for both a presidential candidate and for NCPAC.[100] During the period between 1975 and January, 1982, NCPAC paid 12% of its operating funds to Mediamerica, Inc., a media

94. Joint Appendix at 36.
95. Joint Appendix at 37.
96. Joint Appendix at 37.
97. Joint Appendix at 37.
98. Joint Appendix at 37.
99. Joint Appendix at 45.
100. Joint Appendix at 54.

production and advertising firm.[101] During 1980, that company simultaneously provided services to a presidential candidate and NCPAC.[102]

That type of close and interlocking tie between official campaigns and PACs, not only establishes the potential for undue influence, but also creates the appearance of undue influence. The more skeptical the public is about the true independence of presidential candidates from the large money reserves of PACs, the less confidence the public will have in its highest elected official.

2. *The Press Has Reported That "Independent" PAC Expenditures Are In Fact Coordinated With Official Campaigns*

There have been numerous reports in the press that the allegedly independent expenditures of the large, well-financed, professionally managed PACs are not independent, but rather are closely coordinated with the official campaign. These reports, for the most part, have been based on the statements of the PAC and campaign officials themselves. Lyn Nofziger, an official of a presidential campaign organization, is reported as saying that an "independent" committee would have no problem getting the information that it needed to coordinate its activities with those of the official campaign.

> "There's no way in the world that if I'm running an independent campaign I'm not going to get the information I need, or Dick Wirthlin's [a presidential candidate's pollster] data or talk to the chairman of the Republican National Committee or whatever."[103]

The communication is, moreover, in both directions. Senator Helms (R., N.C.), Honorary Chairman of a PAC, the National Congressional Club, has stated that "I've had to . . . talk

101. Joint Appendix at 55.
102. Joint Appendix at 55.
103. Joint Appendix at 34.

indirectly with [Senator] Paul Laxalt (R. Nev.) [a national presidential campaign chairman]" to avoid a direct consultation with the then-candidate,[104] adding: "I hope that the Senator [Laxalt] would pass along [the messages], and I think the messages have gotten through all right."[105] As the former Executive Director of FCM, a PAC which expended over two million dollars supporting a presidential candidate in 1980, is reported to have described it, the result is "a little dance." "[W]e dance around the law in a way that never breaks the letter but breaks the spirit of the law — but we don't agree with the law anyway."[106]

3. *It Is Impossible To Police "Independent" PAC Expenditures To Ensure That They Are Not Coordinated with Official Election Campaigns*

In the case of sophisticated PACs, there is no possibility of effectively ensuring that their allegedly independent expenditures are not in fact coordinated with the official campaign. There are too many links that cannot be policed and too many ways that information can be gotten and given.[107]

That the prohibition against coordinated activity between official campaigns and unauthorized PACs cannot be enforced is clear from the experience of the FEC. In response to complaints filed during the summer of 1980 alleging that several political committees were impermissibly coordinating their activities with an official presidential election campaign, the General Counsel of the FEC recommended a finding that there was "reason to believe" that several PACs, including the ones involved in this case, had violated the Act. The FEC accepted the recommendation as to both NCPAC and FCM. After expending significant resources investigating the complaints and after the passage of two and one-half years, the FEC decided not to pursue the matter further.[108] In reaching this decision, the General

104. Joint Appendix at 44.
105. Joint Appendix at 44.
106. See remarks of Paul Dietsch, Joint Appendix at 38.
107. Joint Appendix at 38, 50, 52.
108. General Counsel's Report at 7, *In re Reagan*, MUR 1252 1299.

Counsel specifically rejected a finding of no probable cause, acknowledging that enough questions had been raised.[109] Rather, he explained, the FEC simply did not have the resources to complete the investigation.[110]

Even in the case of PACs which do the dance poorly or arrogantly refuse to maintain even a facade of independence, the line between independence and coordination is extremely difficult to establish within the short space of a campaign. By the time the issue is investigated and adjudicated the damage is done and done irretrievably.

In the case of individuals, there is much less danger that their "independent" expenditures will undermine the Fund Act. The amounts they expend pale next to those of the PACs, and their sources of information about and ties to the official campaign will almost certainly be poorer. The PACs, on the other hand, have developed into exactly what Congress feared they would become, a subterfuge for destroying the integrity of the Fund Act.[111]

4. *PACs Are Constituted For The Purpose of Exercising Influence*

The purpose of PACs is to concentrate the resources of a special interest group, not so that its voice will be heard, but so that its ability to use money as influence cannot be ignored. It is a vehicle to intimidate elected officials. In 1980, NCPAC sent an "urgentgram" to what it hoped would be supporters of its presidential candidate. The letter suggested that those who contributed in response to the letter also send the enclosed post card to the candidate saying what they had done on his behalf through giving to NCPAC's "independent" campaign.[112] The obvious purpose of the post card drive was to make it clear to the candidate just how much NCPAC had contributed to his campaign effort and to create thereby a political debt.

109. General Counsel's Report at 7, *In re Reagan*, MUR 1252 1299.
110. *Id.*
111. 117 Cong. Rec. 42397 (1971) (remarks of Sen. Taft).
112. Joint Appendix at 52.

Whether NCPAC has been successful in influencing policy by its ability to raise and spend money on behalf of candidates is not the issue. The potential for, and appearance of, undue influence is clearly there. As Douglas L. Bailey, a prominent media consultant has noted, successful fundraisers now wield great influence:

> "[T]he guy who can raise $51,000 in contributions is the guy who is incredibly important to [a] campaign and therefore has a significant amount of power."[113]

"The guy" who, like NCPAC's Chairman Dolan, succeeds in putting together a multimillion dollar war chest is certain to have the opportunity to test the corrosive effects of massed wealth. The Constitution does not require Congress to let the corrosion occur.

5. *PAC Directors And Contributors Have Received Special Favors*

The record makes it clear that PAC directors and contributors enjoy special privileges and are given access to political figures solely on the basis of their contributions and their ability to raise funds. It has been reported in the press that several Cabinet members have held "off the record" and confidential policy briefings for NCPAC contributors.[114] For its largest contributors, NCPAC succeeded in getting a full day's briefing with the President and his aides. John Dolan has, according to the press, stated that these briefings greatly aid NCPAC's fund raising efforts.[115] This special access, the ability to open doors which would otherwise be closed, is precisely one of the types of quid pro quo that Congress feared when it passed section 9012(f).[116]

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113. Joint Appendix at 45-46.
114. Joint Appendix at 32.
115. Joint Appendix at 33.
116. 117 Cong. Rec. 41958 (1971).

C. The Public Perceives PACs As Exercising Undue Influence

The plaintiffs presented to the district court two polls, each conducted by a widely-respected, national polling organization,[117] which provide strong support for the congressional judgment that the public believes that PACs exercise inappropriate and undue influence.[118] The Harris Survey, taken between

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117. The Harris Survey is reproduced in the Joint Appendix at 77-80. The Roper Survey is reproduced in the Joint Appendix at 69-76.

118. The District Court excluded both polls on the alternative grounds that, under, F.R. Evid. 403, they were unfairly prejudicial to the defendants and that, under F.R. Evid. 401, they were irrelevant. As a matter of law, these determinations are erroneous.

The unfair prejudice that allegedly outweighed the probative value of the two polls arose, according to the district court, because the defendants had only two to three weeks before oral argument, which was approximately nine weeks before the District Court ruled, to study the methodology of the Harris and Roper polls. The amount of time defendants had to consider the polling data was reasonable given the severely telescoped timetable under which all parties were operating. For example, the ruling on defendants' motion to dismiss was not made until approximately five weeks before oral argument. The issue of polling data, which had been raised earlier, was addressed at the scheduling conference concerning discovery on the merits and the creation of a factual record which, because of the expedited schedule, was held only four weeks before oral argument. The court permitted only about two weeks from the date of that conference for the compilation of a factual record and, prior to that conference, the court had severely limited discovery. (Joint Appendix 1-3).

In any event, the defendants did not object that they had an insufficient amount of time to respond to the polling data and did not claim that they did not have their own polling expertise immediately available to them, a claim which they could not make since they had a close and continuing relationship with a sophisticated, polling organization. See *e.g.*, Joint Appendix at 37, 54. The District Court neither took affidavit evidence nor held a hearing on the issue of prejudice. Whether it would ever be proper to exclude such evidence on the ground of prejudice absent a showing of prejudice, it is clearly improper in the context of a case tried without a jury. As the United States Court of Appeals for the Fifth Circuit held in *Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981), the portion of Rule 403 having to do with undue prejudice "has no logical application to bench trials." See Moore's Federal Practice, Rules Pamphlet, part 2, at 77 (1984).

The exclusion of the polling data based on Rule 401 confuses the issues of

April 7 and April 10, 1983, asked a single question about nineteen different types of PACs. Those surveyed were asked:

> "Many business, labor, and other groups have formed political action committees, or PACs, that support and give money to candidates for office. How much would you trust (READ EACH ITEM) if that group were to support and give money to a candidate *for president* in 1984 — a great deal, somewhat, not very much, or not at all.

The results from the survey indicate clearly that Americans mistrust PAC support of presidential candidates. With only two exceptions, PAC contributions were viewed with distrust by more than half of those surveyed. By a ratio of 60 to 32, those surveyed said that they would distrust support from NCPAC to a presidential candidate.

NOTE — *Continued*

admissibility of that evidence with the weight to be given to that evidence. For example, in refusing to admit the Harris Poll into evidence the District Court explained:

> "The Harris poll's question focused on public trust in political action committees that supported or contributed to campaigns. But massive public distrust in *political committees* cannot save section 9012(f). Only distrust in the integrity of government engendered by the conduct proscribed in section 9012(f)'s prohibitions can save the statute."

Democratic Party v. National Conservative Political Action Committee, D.J.S. App. at A-56. In order to be admissible as relevant, evidence does not need to be conclusive on the precise question at issue. It need not even be directed at a point in dispute. All that is required is that it have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." F.R. Evid. 401. The fact that the public distrusts PAC support for presidential candidates, a finding of the Harris Poll, and that it believes that support by PACs, whether through contributions or "independent" expenditure, to presidential candidates gives PACs too much control over elected officials, findings of the Roper Poll, certainly meets the Rule 401 requirement for relevance. It is by any standard evidence which has a "tendency" to buttress the congressional judgment that large "independent" expenditures by PACs create an appearance of corruption. Nothing more is required to show relevance under Rule 401. The District Court's ruling refusing to admit the polling data into evidence was wrong as a matter of law. It should be reversed.

The Roper Organization's poll, the results of which are consistent with both the Harris poll and congressional judgment, consisted of five relevant questions. The first question listed eight groups[119] and then asked the following question:

> "There are a number of different kinds of people and organizations that a candidate for President might receive campaign contributions from. For each one would you tell me whether you think a candidate should be able to accept any amount he is offered, or accept no more than $1,000, or accept nothing at all from that source?"

Respondents stated overwhelmingly that groups, right and left wing, should be limited. Less than one quarter said that groups like NCPAC should be able to contribute unlimited amounts. In contrast, those same respondents were much more reluctant to limit individual contributions, even those of wealthy persons.

The second question asked why those who favored these limits did so. Fully 60% of those surveyed cited the reason given by Congress and held to be valid by this Court — contributions by such groups give them too much influence over elected officials.

Questions three and four confirm that there is a widespread belief that publicly funded campaigns are fairer and that those that receive public funds are less open to undue influence.

Question 5 explores whether in the public's mind the distinction between PAC support of a presidential candidate through contributions and PAC support through "independent" expenditures is meaningful. The public's response to Question 5 makes clear that it perceives a political action committee "independent" spending to support a presidential candidate not to be materially different from a PAC contributing money directly to that candidate's campaign, and believes that both forms of support should be limited.

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119. Labor unions, business corporations, ordinary citizens, millionaires, right wing conservative groups, left wing liberal groups, special interest groups like gay activists or anti-abortion groups, and organized gambling interests.

These polls demonstrate that Congress correctly assessed the attitudes and concerns of the American people about PACs. There is a widespread concern that PACs gain too much influence by spending money on behalf of a candidate, and that it is irrelevant whether that spending is direct, in the form of a contribution, or indirect, in the form of an expenditure.

The polls presented to the District Court support the congressional judgment and are entirely consistent with it. There was no evidence presented whatsoever that the congressional judgment was wrong. When combined with the customary deference owed to Congress, the evidence of the polls and the total lack of any contrary evidence lead inescapably to the conclusion that Congress properly determined that PAC expenditures presented a problem of the appearance of corruption, and that it was proper, therefore, to regulate those expenditures.

D. Section 9012(f) Is Not Constitutionally Overbroad

The application of the overbreadth doctrine to declare a statute facially unconstitutional constitutes a significant departure from traditional rules of practice.[120] It is manifestly "strong medicine," that has been applied "sparingly and only as a last resort."[121] Where it has been applied to statutes which regulate "conduct and not merely speech," "the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[122] As noted above, Congress may place restrictions on speech in connection with federal elections where it acts in a neutral fashion to prevent the corrosive effects of the appearance of undue influence. Congress made the judgment that PAC spending created both the potential for, and the appearance of, undue influence. The court below acknowledged that large expenditures by professionally managed PACs can create the appearance of corruption.[123] The court below also found that "[u]ncontroverted and admissible evidence shows that 70% of the independent expenditures made in the 1980 campaign were by political committees whose aggregate expenditures exceeded $1,000,000."[124] Thus, on the basis of these two findings alone, it is apparent that with respect to section 9012(f) there is a "core of easily identifiable and constitutionally proscribable conduct" that the statute prohibits.[125] There is no evidence that section 9012(f) has been applied, will be applied, or has been interpreted by the government to apply, to any conduct which is not constitutionally proscribable.

In the most closely analogous case to this one, *Federal Election Commission v. National Right to Work Committee*, this Court rejected the overbreadth argument. "While §441b restricts solicitation by corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the potential for such influence that demands regulation."[126] Thus, section 441b was not constitutionally overbroad, even though it forbids any expenditure of funds, applies to the smallest corporations, and to those, like NRWC, which are not attached to businesses or unions.[127] Section 9012(f) does not completely limit PAC spending and impacts overwhelmingly on the largest PACs which generally are themselves, in fact, corporations. In any event, the issue of whether a statutory provision is unconstitutionally overbroad cannot rise or fall on the virtually non-existent differences in organizational form between structures like NRWC and structures like NCPAC.[128]

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120. *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

121. *Broadrick v. Oklahoma*, 413 U.S. at 613. *See also Maryland v. Munson*, 52 U.S.L.W. 4877, 4879 (June 26, 1984).

122. *Broadrick v. Oklahoma*, 413 U.S. at 615.

123. *Democratic Party v. National Conservative Political Action Committee*, DJS Appendix at A-9, A-83-A-84.

124. *Democratic Party v. National Conservative Political Action Committee*, DJS Appendix at A-83-A-84.

125. *Maryland v. Munson*, 52 U.S.L.W. at 4880.

126. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 210.

127. But cf. *Democratic Party v. National Conservative Political Action Committee*, DJS Appendix at A-84.

128. *See Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 210.

E. Congress Acted To Meet A Compelling Governmental Need In Enacting Section 9012(f)

Congress determined that PAC expenditures of more than $1,000, made to further the election of a candidate for President or Vice-President, who has accepted public campaign funds, create a dangerous risk of corruption or the appearance of corruption. The Congressmen who voted overwhelmingly for this legislation had daily contact with political committees and understood well the problems that they create. There is probably no other governmental body with greater expertise in this area.

The evidence presented to the District Court supports the congressional judgment. It shows that there are close connections between the PACs and official campaigns, that PAC officials and large PAC contributors enjoy special access to the executive branch of the federal government, and that the PACs expect to be listened to and to exercise influence on administration policy. The evidence also demonstrates that the public perceives that influence of the PACs to be negative and to require control. It further shows a sharp difference between the attitudes of the public toward expenditures by individuals and those by PACs, confirmation of this nation's long-standing mistrust for "factions."

Congress recognized that without section 9012(f) the Fund Act would cease to be a public funding alternative to financing Presidential campaigns with private funds and would become an incentive to create shadow campaign organizations. No Presidential candidate could afford to sit idly by while members of his opponent's campaign staff went off to establish "independent" political action committees. The amounts of money that these committees raise is simply too large. A candidate would be forced either to abandon public funding altogether or to attempt to exploit the PAC subterfuge feared by Congress and used by his opponents.

Without controls on PAC expenditures, like those contained in section 9012(f), the Fund Act would merely change the form of activity which creates the damaging appearance of corruption. It would cease to act as a protection against the corrosive effects of aggregated wealth. What is worse, the new form of activity is more dangerous and pernicious than that which preceded it. The resources expended by NCPAC in 1980 dwarf those independent expenditures made by any individual in that year, and were within the control of a single person[129] Professionally managed PACs, like NCPAC, have the capability of conducting campaigns that are thoroughly coordinated with the official campaigns. These efforts, which can substantially aid the candidate, are the quid that will later demand a quo.

Section 9012(f) singles out this single, dangerous organizational form for special regulation. It is a narrowly tailored response to the particular problem at hand. It is true that Congress might have set the expenditure limit higher. The District Court in oral argument suggested it might have had less of a problem with section 9012(f) if Congress had set it at $50,000.[130] This Court has recognized, however, that such line drawing is for Congress, not the courts.[131]

Nothing in the record suggests that the congressional judgment about PACs was incorrect. The defendants have failed completely to carry their burden of showing that the compelling governmental purpose of controlling the appearance of corruption fails to outweigh the narrow restriction on the speech rights of their peculiar organizational form.

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129. Joint Appendix at 26-28, 32.

130. *Democratic Party of the United States, et al. v. National Conservative Political Action Committee, et al.*, C.A. No. 83-2329; *Federal Election Commission v. National Conservative Political Action Committee, et al.*, C.A. No. 83-2823, transcript of oral argument, October 27, 1983, at 84.

131. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. at 210.

IV. CONCLUSION

Because section 9012(f) enhances pertinent First Amendment values and serves the compelling governmental interest of protecting against corruption and the appearance of corruption in presidential election campaigns, the Democratic Party of the United States and the Democratic National Committee respectfully request this Court to reverse the decision of the District Court for the Eastern District of Pennsylvania and declare section 9012(f) of the Fund Act constitutional.

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APPELLANT'S BRIEF

Supreme Court, U.S.
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Nos. 83-1032 and 83-1122

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL., APPELLANTS,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

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QUESTIONS PRESENTED

1. Whether the First Amendment to the Constitution of the United States precludes Congress from determining that it is necessary to limit the amount of money political committees may spend on qualified campaign expenses to further the election of publicly financed presidential candidates, in order to ensure the effectiveness of public financing as an alternative means of financing presidential election campaigns.

2. Whether Congress intended 26 U.S.C. § 9011(b) to confer on all voters a right to sue other private parties for construction and enforcement of the provisions of the Presidential Election Campaign Fund Act, in a three-judge district court with expedited direct appeal to this Court.*

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* Other parties to this proceeding are: the Fund For A Conservative Majority, Democratic National Committee, and Edward M. Mezvinsky.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

OPINION BELOW

The opinion of the district court is reported at 578 F. Supp. 797 and is reproduced on pages 1a-99a of the Appendix to the Jurisdictional Statement filed by the Federal Election Commission in No. 83-1032 and on pages A-1—A-88 of the Appendix to the Jurisdictional Statement filed by Appellants in No. 83-1122.[1]

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[1] References in this brief to the district court's opinion will be to the pages of the Appendix to the Jurisdictional Statement filed by the Commission in No. 83-1032, which will be cited as "FEC App. ——". References to the pages of the Joint Appendix filed by the parties will be cited as "J.A. ——.".

JURISDICTION

In separate actions, the Federal Election Commission and the Democratic Party of the United States, the Democratic National Committee and Edward Mezvinsky invoked the jurisdiction of a three-judge district court pursuant to 26 U.S.C. §§ 9010(e) and 9011(b) to "implement or construe" a provision of the Presidential Election Campaign Fund Act: section 9012(f) of Title 26. A three-judge district court in the Eastern District of Pennsylvania found its jurisdiction had properly been invoked to hear both cases, and entered its final judgment on December 12, 1983 (FEC App. B). The Commission filed a timely notice of appeal (FEC App. C) on December 16, 1983 and filed its Jurisdictional Statement in No. 83-1032 on December 22, 1983. The Democratic Party plaintiffs also filed a timely notice of appeal and filed their Jurisdictional Statement in No. 83-1122 on January 6, 1984. The Court noted probable jurisdiction and consolidated the two cases on April 16, 1984 (J.A. 81-82). This Court has jurisdiction pursuant to 26 U.S.C. §§ 9010(e) and 9011(b)(2), and 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The district court decided that the inclusion of a limitation on certain expenditures by political committees, 26 U.S.C. § 9012(f), in the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (hereafter "the Fund Act"), violated the First Amendment to the Constitution of the United States. Also at issue is the scope of the jurisdictional provision relied upon by the Democratic Party plaintiffs, 26 U.S.C. § 9011(b). The full text of the Fund Act is reproduced in FEC App. D.

STATEMENT OF THE CASE

On May 16, 1983, the Democratic Party of the United States, the Democratic National Committee and Edward Mezvinsky (hereafter referred to collectively as "the Democratic Party") filed suit for declaratory and injunctive relief[1] against the National Conservative Political Action Committee ("NCPAC") and the Fund For A Conservative Majority ("FCM") alleging that those respondents had or would violate 26 U.S.C. § 9012(f) (J.A. 6, 8, 18-23). At the request of the Democratic Party, a three-judge district court was convened pursuant to 26 U.S.C. § 9011(b), and an expedited schedule set (J.A. 6). On June 7, 1983, the Federal Election Commission (hereafter "the Commission" or "FEC") moved to intervene in the action as a party defendant for the purpose of moving to dismiss the Democratic Party complaint as inappropriate under 26 U.S.C. § 9011(b) (J.A. 6, 7).

On June 13, 1983, the Commission initiated its own suit, pursuant to 26 U.S.C. §§ 9010(e) and 9011(b), seeking a declaratory judgment implementing and construing section 9012(f) as a constitutionally valid proscription of certain expenditures appellees proposed to make in connection with the 1984 presidential election campaign (J.A. 1, 13-17). On June 22, 1983, the district court granted the Commission's motion to intervene and consolidated the two cases (J.A. 7).

The district court entered judgment in the consolidated cases on December 12, 1983. It denied the Commission's motion to dismiss the Democratic Party's suit, concluding that 26 U.S.C. § 9011(b)(2) should be read to grant every voter in the United States an "express private right of action" (FEC App. 21a) to enforce as well as to construe the provisions of the Fund Act (FEC App. 13a-30a). The court concluded on the merits that the expenditure limitation in 26 U.S.C. § 9012(f) is substantially overbroad, that it chills constitutionally protected freedoms of speech and association, and that no narrowing construction of the provision would satisfactorily mitigate the pervasive overbreadth problems. The lower court accordingly ruled that section 9012(f) violates the First Amendment to the Constitution. (FEC App. 9a-10a, 37a-99a.)

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[1] On July 12, 1983, the Democratic Party filed an amended complaint which deleted the request for injunctive relief.

SUMMARY OF ARGUMENT

I.

Section 9012(f) of Title 26, United States Code, is an integral provision of the legislative scheme adopted by Congress in 1971 to provide full public financing of the general election campaigns of major party candidates for the office of President of the United States. This Court has already found that legislative scheme as a whole, contained in the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, to be a constitutionally permissible legislative effort both to "eliminat[e] the improper influence of large private contributions" and to use "public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley* v. *Valeo*, 424 U.S. 1, 92-96 (1976).

As the Court recognized in *Buckley*, 424 U.S. at 99, Congress concluded that the public financing system would not adequately serve its intended purposes without controls to ensure that the public funds were truly a substitute for private financing, and not in effect merely a subsidy. To this end, Congress included in the statute a prohibition on publicly financed candidates accepting private contributions or spending more than their public allotments on campaign expenses. Section 9012(f), which places a $1,000 limit on campaign expenditures by political committees to further the election of a publicly financed candidate during the presidential general election, was adopted to ensure that a privately financed campaign could not be conducted in support of a publicly financed candidate through the artifice of a nominally independent committee formed by the candidate's political allies.

Congress considered this measure to be crucial to the success of the statutory scheme; indeed, inadequate controls on supplemental private campaigns was one of the major stumbling blocks to enactment of a public financing statute in the late 1960's. Congress debated the

proper scope of the limitation in section 9012(f) in light of constitutional concerns, and carefully tailored it to counter the particular problem at which it was aimed without infringing on the ability of citizens to engage freely in political speech. The conscious determination of Congress that this is an appropriate and constitutional means to achieve important governmental interests is entitled to deference. *Rostker* v. *Goldberg*, 453 U.S. 57, 64, 67 (1981).

Moreover, Congress' judgment that large, nominally independent political committees are uniquely capable of undermining the purposes of the public financing statute is confirmed by the spending of such committees during the 1980 election campaign. Several committees conducted massive private spending campaigns to supplement the official campaign of a candidate who had accepted full public funding. The relationship between these committees and administration officials also confirms Congress' judgment that privately financed expenditure campaigns can give rise to the same sort of appearance of corruption as the contributions that the full public funding system displaces.

Section 9012(f) is not unconstitutionally overbroad. It does not interfere with the freedom of citizens to engage in political speech and participate in presidential campaigns; to the contrary, the statute's tax return check-off system provides a new opportunity for millions of Americans to participate in the financing of presidential campaigns. Moreover, section 9012(f) does not interfere with the ability of either the contributors or the managers of political committees to spend as much as they want to publicize their own political views; its only effect is to limit the utilization by the managers of the committees of money obtained from others to publicize their own political views. Regulation of this "transformation of contributions into speech" does not significantly trench upon core First Amendment rights. *Buckley* v. *Valeo*, 424 U.S. at 21. In sum, section 9012(f) is carefully drafted to sweep only so far as is necessary to

forestall a substantial threat to the public financing system, and the appellees here fall within the core of the provision's coverage.

II.

Section 9011(b) of Title 26, United States Code, which authorizes suits to "implement or construe" the public financing statute, to be heard by a three-judge district court with direct mandatory appeal to this Court, was not intended by Congress to authorize a private party that has no dispute with the manner in which the Commission is administering the law to sue another private party merely to obtain judicial confirmation of the Commission's approach. It has long been established that statutes authorizing appeals to this Court are to be strictly construed, and there is nothing in the legislative history of section 9011(b) to indicate that Congress intended it to do anything more than quickly resolve disputes between private parties and the Commission over how the statute was being administered.

Even if section 9011(b) were not so limited, the Democratic Party lacks Article III standing to litigate this case because a favorable decision here will not redress any injury suffered by the Party. Congress has explicitly reserved to the Commission exclusive jurisdiction over the administration and enforcement of the public financing statutes, 2 U.S.C. § 437c(b)(1), and the Commission has already announced its view that the statute is valid and enforceable. Thus, a judicial declaration that section 9012(f) is constitutional will not alter the Party's ability to obtain relief from violations of that provision, for both before and after such a declaration the Commission would conduct enforcement proceedings on the Party's administrative complaint, and the Party would have no legal recourse other than to await the Commission's resolution of the matter.

ARGUMENT

I. CONGRESS DID NOT VIOLATE THE FIRST AMENDMENT BY DETERMINING THAT A LIMIT ON EXPENDITURES BY POLITICAL COMMITTEES FOR QUALIFIED CAMPAIGN EXPENSES TO FURTHER THE ELECTION OF A PUBLICLY FUNDED PRESIDENTIAL CANDIDATE WAS NECESSARY TO AN EFFECTIVE PUBLIC FINANCING SYSTEM

A. Section 9012(f) Must Be Presumed to Be Within Congress' Constitutional Power

This Court has long recognized the authority of Congress, pursuant to Article I, Section 4 of the Constitution, "to preserve the purity of presidential and vice-presidential elections" against the "two great natural and historical enemies of all republics, open violence and insidious corruption." *Burroughs* v. *United States*, 290 U.S. 534, 544, 546 (1934). *Accord*, *Ex Parte Yarbrough*, 110 U.S. 651, 657-8 (1884); *Buckley* v. *Valeo*, 424 U.S. 1, 13 (1976); *Marchioro* v. *Chaney*, 442 U.S. 191, 196 (1979). The "choice of means" to achieve these ends "presents a question primarily addressed to the judgment of Congress." *Burroughs*, 290 U.S. at 547. *See also FEC* v. *National Right To Work Committee*, 459 U.S. 197, 209-10 (1982). Congress acted within this authority when it concluded in 1971 that a comprehensive public financing system was necessary and proper to preserve public confidence in the fairness of the presidential election process and the integrity of the operation of the government. In short:

> Congress has power to regulate Presidential elections and primaries . . . and public financing of Presidential elections as a means to reform the electoral process was clearly a choice within the granted power.

Buckley v. *Valeo*, 424 U.S. at 90.

Like other congressional enactments, the provisions of the campaign financing statutes come to this Court with

a presumption of constitutionality, *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960), which is particularly strong in this case because this Court has already found the public financing system, of which section 9012(f) is an integral part, to be constitutional. *Buckley* v. *Valeo*, 424 U.S. at 108 n.147. "[I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981), *quoting Ferguson* v. *Skrupa*, 372 U.S. 726, 729 (1963), and "[t]he judgment of the Legislative Branch cannot be ignored or undervalued simply because one [group] . . . casts its claims under the umbrella of the First Amendment." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973).

> [First Amendment] cases are not an exception to the principle that we are not legislators, that direct policymaking is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.

Dennis v. *United States*, 341 U.S. 494, 539-540 (1951) (Frankfurter, J., concurring).[5] These principles are particularly compelling when Congress addresses itself to federal elections, an area in which the members of Congress have particular expertise and experience.

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[5] It is well established that Congress' factual conclusions and legislative judgment must be accepted by the courts unless irrational or unreasonable, *see, e.g., McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 (1938), and this Court has not second-guessed the legislative judgment on the reach or urgency of an acknowledged danger, or upon the wisdom of the chosen remedy, even in cases under the First Amendment. *See, e.g., Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 303, 304 (1974); *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973); *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *California* v. *LaRue*, 409 U.S. 109 (1972); *United States* v. *Robel*, 389 U.S. 258, 271, 285 (1967) (Brennan, J., concurring; White, J., and Harlan, J., dissenting); *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94-95, 169-70 (1961).

Contrary to the apparent assumption of the court below and of the district court in *Common Cause* v. *Schmitt*, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided Court*, 455 U.S. 129 (1982), these principles are not rendered inapplicable merely because the statutory provision under review takes the form of a limitation on election campaign expenditures. This Court has never said Congress cannot control such expenditures; to the contrary, this Court has explicitly noted the important governmental interests involved in controlling the use of amassed wealth to affect federal elections, and has not questioned Congress' authority to control expenditures when it determines this to be necessary and proper to protect against the potential for corruption inherent in the financing of candidate elections. *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978); *Buckley* v. *Valeo*, 424 U.S. at 58 n.66 (limitations on expenditures by political parties), 57 n.65 (limitations on expenditures by publicly funded candidates); *FEC* v. *National Right To Work Committee*, 459 U.S. at 207-11 (prohibition of expenditures by corporations and unions); *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981) (limitation on expenditures by party committees); *Republican National Committee* v. *FEC*, 487 F. Supp. 280, 285-86 (S.D.N.Y.), *aff'd mem.* 445 U.S. 955 (1980).

Moreover Congress is not required, as the district court assumed, to demonstrate that corruption has actually resulted from the campaign financing practices it seeks to control. Rather, Congress is empowered to enact prophylactic rules to foreclose candidate financing practices that have the potential to lead to a *quid pro quo*, for the opportunity for abuse can itself give rise to an appearance of corruption. *See Buckley* v. *Valeo*, 424 U.S. at 27 ("the appearance of corruption stem[s] from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions"), 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety

requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated"); *FEC* v. *National Right To Work Committee*, 459 U.S. at 210 (Court will "accept Congress's judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

B. Section 9012(f) Is An Integral Part Of The Public Financing System

The central choice that successive Congresses have faced in structuring campaign finance reform is how to balance the need to control the corrosive impact of aggregations of wealth on the electoral process against the ability of individuals to participate in that process and engage in political expression. Debate over that balance resurfaced in the late 1960's and early 1970's when it began to appear that the controls established by the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, as amended, were inadequate. This reassessment of the overall legislation controlling campaign financing for federal elections resulted in two major pieces of legislation. The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (now codified at 2 U.S.C. §§ 431-455) (hereafter "FECA"), established a comprehensive code for registration and reporting by all political committees, and set forth precise limits and disclosure requirements for contributions and expenditures. The Presidential Election Campaign Fund Act, Pub. L. No. 92-178, § 801, 85 Stat. 497 (1971) (codified at 26 U.S.C. §§ 9001-9013) (hereafter "the Fund Act") created a public financing system for the presidential general election.*

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*The Fund Act established a separate account within the Department of the Treasury, funded by voluntary designations of $1.00 by taxpayers, to be used to provide complete campaign financing for major party candidates in the presidential general election campaign. Major party candidates who choose to participate in the public financing system and who satisfy the eligibility requirements outlined in 26 U.S.C. § 9003 are entitled to equal payments from the Fund to defray all of their "qualified campaign expenses," (*i.e.*, expenses incurred by the presidential or vice presidential candidates, or any of their authorized committees, to further their election, 26 U.S.C. § 9002(11), 26 U.S.C. § 9004(a)(1), (c)(1). For the 1984 election, each candidate will receive approximately $40 million from the Fund. A candidate who chooses public financing cannot accept private contributions, unless necessary to make up for any deficiency in the fund, 26 U.S.C. §§ 9003(b)(2), 9012(b), and may not spend more than the allotment he or she receives under § 9036, 26 U.S.C. §§ 9003(b)(1), 9012(a)(1). A publicly funded candidate's political party can expend a limited amount to further the candidate's campaign, $6.9 million in 1984, and nonparty political committees are permitted to expend up to $1,000 to defray expenses that would have been qualified campaign expenses if incurred by the candidate or his authorized committees. 2 U.S.C. § 441a(d)(2); 26 U.S.C. § 9012(f). Candidates that are not eligible for, or decline to accept, public financing are not limited in the amount of private contributions they can accept or the amount of money they can expend on their campaigns, and political committees supporting such candidates may make unlimited expenditures to further the candidate's campaign.

Congress adopted a partial public financing system for presidential primary elections in 1974, in the Presidential Primary Matching Payment Account Act, Pub. L. No. 93-443, § 408(c), 88 Stat. 1297 (1974) (codified at 26 U.S.C. §§ 9031-9042). Additional election campaign funding reforms were enacted in 1974, 1976 and 1979. *See* 88 Stat. 1263; 90 Stat. 475; 93 Stat. 1339.

In *Buckley* v. *Valeo*, 424 U.S. 1, 85-104 (1976), this Court upheld the constitutionality of the public financing system established by the Fund Act, finding that "public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest . . . and Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions." 424 U.S. at 96. As the Court noted, the purposes of the Fund Act were not limited to remedying those particular evils prevalent in privately funded presidential campaigns, but extended to constructing a comprehensive plan which "furthers, not abridges pertinent First Amendment values" by using "public money to facilitate and enlarge public

discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93.

As the Court recognized in *Buckley*, 424 U.S. at 99, "[p]ublic funding for candidates of major parties is intended as a substitute for private contributions." This was crucial to the success of the statutory scheme, for if a candidate were able to obtain public funding to augment a privately financed campaign, the statute would fail in its purpose of providing an avenue for major candidates to avoid any appearance of obligation to financial supporters of their campaigns by eschewing all reliance upon the largesse of special interests.

In addition, Congress was concerned lest the public funding system so unfairly advantage the major parties as to effectively restrict the opportunities for effective advocacy by other parties. *See, e.g.*, 117 Cong. Rec. 41,951 (remarks of Sen. Cooper), 41,955 (remarks of Sen. Allen), 41,956 (remarks of Sen. Long) (1971). In fact, this Court indicated in *Buckley* v. *Valeo*, 424 U.S. at 95, 99, 101, that the public funding system might not pass constitutional muster if its effect were merely to increase the funding advantage major party candidates hold over minor candidates. *Accord, Republican National Committee* v. *FEC*, 487 F. Supp. at 284 n.6.

For these reasons Congress prohibited publicly financed candidates from receiving private contributions, 26 U.S.C. §§ 9003(b)(2), 9012(b), and imposed expenditure limitations on the candidates, 26 U.S.C. §§ 9003(b)(1), 9012 (a)(1), and on the candidates' political parties, 2 U.S.C. § 441a(d)(2). These provisions ensure that the statute "substitutes public funding for what the [major] parties would raise privately" and, by prohibiting private donors from contributing to major candidates, they "improve the chances of non-major parties and their candidates to receive funds and increase their spending." *Buckley* v. *Valeo*, 424 U.S. at 95 n.129, 101. Long experience with the realities of federal election financing, however, convinced Congress that prohibition of direct contributions to candidates was inadequate to ensure that public financing would not become a subsidy to privately financed campaigns. Congress concluded that a prophylactic measure was necessary to ensure that the private contributions which could no longer go to the candidate would not merely be redirected to nominally independent campaign committees operated by the candidate's political allies. Because of this concern Congress included in the public financing system 26 U.S.C. § 9012(f), which limits to $1,000 the amount that an unauthorized political committee can expend in support of a publicly financed candidate, on items that would be qualified campaign expenses if incurred by the candidate.[8]

As we show below, Congress carefully considered the scope of the limitation on campaign expenditures by political committees it determined to be necessary for the successful functioning of the public financing system. Fully aware of the constitutional issues raised, Congress carefully tailored section 9012(f) to foreclose the potential of political committees to mount private campaigns as surrogates for publicly financed candidates, taking care to ensure that citizens were not thereby precluded from participating in the "robust, and wide-open" debate essential to our democratic society. *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). Congress clearly viewed the Fund Act as an "attempt to achieve its legislative purpose consistent with constitutional safeguards." *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. at 85. The conscious determination of Congress, after years of debate and investigation, that this legislative scheme is an appropriate and constitutional means to achieve the important governmental interests which the Court has already found to be served by the Fund Act, cannot lightly be disregarded. *Routzer* v. *Goldberg*, 453 U.S. 57, 64, 67 (1981); *FEC* v. *National Right To*

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[8] Appellees have conceded that section 9012(f) applies to the expenditures they plan to make during the 1984 presidential campaign, and both three-judge district courts have rejected any statutory interpretation that would permit such expenditures. An analysis of why this statutory interpretation is compelled is set forth on pp. 5-12 of the Reply Brief the Commission filed in this Court in *FEC* v. *Americans for Change*, No. 80-1067.

Work Committee, 459 U.S. at 209; *McCulloch* v. *Maryland*, 17 U.S. 159, 206, 4 Wheat. 316, 421 (1819); *International Association of Machinists* v. *FEC*, 678 F.2d 1092, 1114 (D.C. Cir.) (en banc), *aff'd mem.*, 459 U.S. 983 (1982).

Thus, "to say [section 9012(f)] presents a First Amendment *issue* is not necessarily to say that it constitutes a First Amendment *violation*." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2129 (1984), *quoting Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 561 (1981) (Burger, C.J., dissenting). The constitutional rights of free political speech and association lie "at the foundation of a free society." *Buckley* v. *Valeo*, 424 U.S. at 25, *quoting Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960).

> Yet, it is clear that "[n]either the right to associate nor the right to participate in political activities is absolute," *CSC* v. *Letter Carriers*, 413 U.S. 548, 567 (1973). Even a " 'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

Buckley v. *Valeo*, 424 U.S. at 25, *quoting Cousins* v. *Wigoda*, 419 U.S. 477, 488 (1975). *Accord, FEC* v. *National Right To Work Committee*, 459 U.S. at 206-7.

C. Section 9012(f) Serves Compelling Governmental Interests

The legislative history of the Fund Act demonstrates that Congress considered section 9012(f) to be crucial to the success of the legislative scheme for public financing of presidential elections. Congress recognized that without some controls on the expenditures of political committees, the federal funds provided to the candidate would effectively serve as a subsidy to the private campaign which could continue to be waged on his or her behalf by political committees formed by the candidate's political allies and associates. In these circumstances, the only difference that public financing would make would be to

give the candidate millions of dollars in public funds to use, while the political supporters who would have worked with the candidate in the absence of public funding would conduct a similar campaign using the money from the same contributors, but without formal links to the candidate. Rather than eliminating the regime of privately financed presidential campaigns, this system would merely relieve the candidate from accountability for the actions of the campaign, and splinter the lines of authority for campaign activities between the official and unofficial campaign chiefs. As shown below, these concerns were among the primary reasons that Congress decided not to permit a public financing statute adopted in 1967 to take effect.

1. *The legislative history of section 9012(f)*

Although the idea had been studied for decades,[6] the first public financing bill Congress adopted was the Presidential Election Campaign Fund Act of 1966, Pub. L. No. 89-809, Title III, 80 Stat. 1587 (hereafter "the 1966 Act"), commonly referred to as the Long Plan for its sponsor, Senator Russell Long. The Long Plan would have enabled every person to contribute $1.00 voluntarily, through a tax deduction system, to a special fund which would be divided equally between, and given directly to, the major political parties. The Long Plan would not have restricted contributions to the candidates themselves.[7]

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[6] The idea of providing public funding "for the proper and legitimate expenses of each of the great national parties" was first proposed by President Theodore Roosevelt in 1907. State of the Union Message of December 3, 1907, *reprinted in* H.R. Doc. No. 1, 60th Cong., 1st Sess., pt. 1 at XLVII (1910). As early as 1937, a Senate Committee suggested that "private contributions to political campaigns be prohibited entirely and that instead all election expenses be defrayed from public funds." S. Rep. No. 151, 75th Cong., 1st Sess. 137 (1937).

[7] The Long Plan was one of several reform proposals considered by Congress during the 1966-1971 sessions. *See, e.g.*, tax deduction system suggested by President Johnson, 112 Cong. Rec. 14,800 (1966) (statement of Senator Long); 113 Cong. Rec. 8296 (1967) (remarks of Senator Williams).

Senator Long viewed his proposal as a start to "help to assure that . . . a presidential candidate would not be subject to any improper influence of the large money interests who otherwise would contribute to his campaign." 112 Cong. Rec. 28,778 (1966) (statement of Sen. Long). Getting the "masses of people to take a financial part in the processes of government" was also expected to "strengthen our political system." 112 Cong. Rec. 13,540 (1966) (remarks of Sen. Williams). *See also* 112 Cong. Rec. 26,398 (1966) (remarks of Sen. Nelson) (It is necessary "to provide financing for campaigns so that there will be no question but that the people who are elected . . . are responsive and responsible to the people of th[e] country, and not to big, powerful economic groups, no matter what such groups might be."); *Financing Political Campaigns: Hearings on S.3196 Before the Senate Committee on Finance*, 89th Cong., 2d Sess. 21 (1966) (statement of Sen. Cannon) ("[W]e are all interested in minimizing the dependency of any candidate on narrow economic interests and we wish to broaden as much as possible the base of that economic support among the people whose participation is essential to a healthy political system."); 112 Cong. Rec. 28,783 (1966) (remarks of Sen. Smathers) ("[we must try] to make it possible to distribute the costs of campaigns over as wide a group as is possible, so that, in truth and fact, nobody, or no one group or no segment of our economy can say, 'we are the ones who financed the campaign,' thereby having a hold on the one who got elected."); 112 Cong. Rec. 28,779 (1966) (remarks of Sen. Smathers).

Even opponents of the Long Plan shared the perception that reform was needed. As Senator Gore, co-leader of the opposition to the Plan, stated:

> The root of corruption in politics is money and the love of power. The means by which the public will is frustrated is money. The means by which elections are manipulated, and contrived, and distorted is money and power. . . . Money threatens to destroy our democratic processes.

112 Cong. Rec. 13,544 (1966). Opposition to the Long Plan was based instead on the concern that the proposal did not provide adequate safeguards to effectuate the purposes for which it was intended. As Senator Gore argued, the Long Plan did not "limit [money's] influence, [nor] regulate its movement and source. . . ." 112 Cong. Rec. 13,544 (1966). In his view, the Long Plan would merely add "federal tax money . . . to what is otherwise available [and] increase rather than decrease the influence of money in federal elections. . . ." 112 Cong. Rec. 28,083 (1966). *See also* 113 Cong. Rec. 8060 (1967).

While the Long Plan was adopted as part of the Foreign Investors Tax Act of 1966, Pub. L. No. 89-809, 80 Stat. 1539,[9] extensive and often heated debate over the 1966 Act continued. Early in 1967, Congress considered several proposals to repeal the 1966 Act before it became operative, along with numerous proposals to modify the Long Plan to ensure proper use of the public money and to provide alternate methods to fund the system.[9] The move to repeal the 1966 Act was led by Senators Gore and Williams. They asserted that the law was "unsound" and "loosely drawn," and feared that "[i]f it becomes operative it will compound the evils that now flow from loose and questionable campaign financing practices." 113 Cong. Rec. 8059 (1967) (remarks of Sen. Gore).

One of the most serious flaws in the 1966 Act, in Senator Gore's view, was its failure to limit the "raising and spending of private funds on behalf of presidential candidates or any other candidates." 113 Cong. Rec. 8062-

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[9] It was not to take effect, however, until the 1967 tax returns were filed in 1968.

[9] *See, e.g.*, S. 786, 90th Cong., 1st Sess. (1967); S. 1238, 90th Cong., 1st Sess. (1967); S. 1407, 90th Cong., 1st Sess. (1967); S. 1547, 90th Cong., 1st Sess. (1967); S. 1698, 90th Cong., 1st Sess. (1967); S. 1734, 90th Cong., 1st Sess. (1967); S. 1827, 90th Cong., 1st Sess. (1967); S. 1882, 90th Cong., 1st Sess. (1967); S. 1883, 90th Cong., 1st Sess. (1967); S. 1890, 90th Cong., 1st Sess. (1967).

63 (1967). The 1966 Act would permit "[n]ational fundraising drives [to] continue as before and the proceeds [to] be spent as they [had] been spent in the past." 113 Cong. Rec. 8063 (1967) (remarks of Sen. Gore). *See also* 113 Cong. Rec. 8304 (1967). Senator Gore's arguments were successful, and the Senate adopted the Gore-Williams amendment to repeal the 1966 Fund Act. 113 Cong. Rec. 9297 (1967).

Undaunted, five days later Senator Long introduced a new amendment, the Honest Election Act of 1967, to take effect after July 1, 1966, when the repeal of the 1966 Act would become effective under the Gore-Williams Amendment. Amdt. No. 167 to H.R. 6950, 113 Cong. Rec. 9978 (1967). The new proposal was intended to meet objections to the 1966 Act by providing for payments directly to the presidential candidate or the candidate's authorized agent and prohibiting the candidate from accepting private contributions to defray certain types of campaign expenses. The proposal still, however, did not include a limit on expenditures. Senator Gore pointed out that many of the defects in Senator Long's original approach remained unremedied in the new proposal. He noted in particular that there was still "no real effective prohibition against privately financed expenditures" as long as the candidate did not have "control" of the organization making the expenditures. 113 Cong. Rec. 10,201 (1967).[10] Senator Long's Honest Election Act was ultimately defeated, 113 Cong. Rec. 12,169 (1967), and the 1966 Act, which technically remained on the books, became inoperative and would remain unfunded pending future congressional enactment of guidelines for distribution and funding. Pub. L. No. 90-26, § 5, 81 Stat. 57 (1967).[11]

[10] Senator Williams argued that "[e]ither you go the whole way with all public financing, all complete control over elections or else you go private. I am not sure where you can step unless you build in a lot of these potential loopholes, such as the independent committees." *Political Campaign Financing Proposals: Hearings Before the Senate Committee on Finance*, 90th Cong., 1st Sess. 169 (1967) (hereafter "*1967 Hearings*"). The fact that "independent groups or associations or political committees would continue to function in raising funds from private sources and spending in behalf of whatever candidate or political party they chose" was seen as having a "demoralizing and shattering effect upon the public financing system." *1967 Hearings* at 364 (statement of Sen. Cannon).

In late 1967 Senator Long reported a bill out of the Senate Finance Committee, H.R. 4890, to which the Committee had added another public financing amendment, also known as the Honest Elections Act of 1967. 113 Cong. Rec. 30,768-72 (1967) (statement of Sen. Long). This proposal would have provided public financing for senatorial as well as presidential candidates. Redrafted to accommodate the objections raised by opponents to the 1966 Act, the bill provided for an income tax credit of up to $25 rather than a $1.00 tax designation, required full accounting, reporting and disclosure, and included a prohibition on the acceptance of private contributions to defray qualified campaign expenses by any candidate who "elects to avail himself of the Government funds available." 113 Cong. Rec. 30,769 (1967) (statement of Sen.

[11] The Senate at first narrowly voted to adopt Senator Long's proposal as an amendment to H.R. 6950 (investment tax credit bill), 113 Cong. Rec. 10,310 (1967). However, immediately following the vote Senator Mansfield moved to recommit H.R. 6950 to the Finance Committee for further consideration without the Long amendment, but with the request that the Committee report back with a provision that would terminate the 1966 Act as of July 31, 1967 (a proposed section 5 of H.R. 6950). *Id.* This motion was agreed to, 113 Cong. Rec. 10,692 (1967), and Senator Long's motion to strike section 5 from the bill was rejected. 113 Cong. Rec. 11,489 (1967). Apparently as a compromise, Senator Mansfield offered an alternative to section 5 which would leave the 1966 Act on the statute books, but would delay authorizing funds to implement it until further specific legislation setting out guidelines for the use of the money could be enacted. 113 Cong. Rec. 11,838-9 (1967). This amendment was approved, 113 Cong. Rec. 12,169 (1967), and the bill as amended was enacted into law. Pub. L. No. 90-26, 81 Stat. 57 (June 13, 1967).

Long).[12] The bill provided that federal funds could be spent only on qualified campaign expenses, defined as expenditures incurred by the presidential or vice presidential candidate of a political party, or by the candidate's authorized committee, to further the candidate's election to such office within 60 days prior to, or within 30 days after, the election. The bill for the first time included a provision to extend expenditure limitations to political committees:

> It shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party in a presidential election knowingly and willfully to incur expenditures to further the election of such eligible candidates which would constitute qualified campaign expenses if incurred by an authorized committee of such eligible candidates, or to make contributions to such eligible candidates or any of their authorized committees to be used, directly or indirectly, to defray qualified campaign expenses, in an aggregate amount exceeding $1,000.

H.R. 4890, 90th Cong., 1st Sess. § 201, p. 24 (1967).

This bill was still viewed as inadequate. A written statement expressing the views of the Committee minority on the campaign funding proposal complained that the proposal still did not assure cleaner elections since, *inter alia*, it did not prevent candidates from "continu[ing] to spend unlimited amounts of private funds for

[12] Senator Proxmire also expressed support for this bill. Conceding that the bill could still be improved, he stressed the "advantage of providing an alternative to the present vicious practice—by far the most corrupting element in American public life—and that is: candidates for the highest offices in this country going hat in hand on bended knee for political contributions from these fat cats—who have an ax to grind—the lobbyists, the big money boys who want to buy political advantage. . . . no force today does more to frustrate the public interest than the power of organized money to buy political influence through campaign contributions." He hoped the bill would "keep[] special vested interests from getting the political handouts and giveaways they now get under the present system." 113 Cong. Rec. 27,112 (1967).

their general campaigns, so long as they stop such spending of funds derived from private contributors 60 days before election day." 113 Cong. Rec. 30,772-73 (1967). The bill "would not put campaign financing on an 'either/or' basis; rather, it would put it on a 'both/and' basis—both private and Federal funds could and no doubt would be used." 113 Cong. Rec. 30,773 (1967) (statement of Sen. Williams). No further actions was taken on the amendment to H.R. 4890 by the Congress; it was not even brought to a vote on the floor.[13]

It was not until 1971 that Congress finally put into effect a public financing plan for presidential elections to free the candidates from their "heav[y] depend[ence] on 'interested' givers who expect a return on their investment, usually in the form of some governmental favor or largesse." 117 Cong. Rec. 41,779 (1971), *quoting N.Y. Times*, June 11, 1971 at 35, col. 5. *See also* 117 Cong. Rec. 41,768 (remarks of Sen. Bentsen); 41,778 (remarks of Sen. Kennedy); 41,937-8 (remarks of Sen. Mansfield). By 1971 it was generally accepted that an effective public financing system would have to include some control of campaign expenditures by political committees in order to ensure that private contributions were not merely redirected into a nominally independent private campaign chest, as labor organizations had done when the Corrupt Practices Act had first been extended to prohibit them from making contributions.[14] Thus, there was little objection to adopting section 9012(f) to resolve the defect in the 1966 Act identified by Senator Gore, by limiting the amount unauthorized political committees can spend to further the election of publicly

[13] Debates over the concept of public financing and election reform in general continued after 1967. *See, e.g.*, 116 Cong. Rec. 9940 (1970) (remarks of Sen. Gore upon introduction of S. 3659, entitled "Election Financing and Reform Act of 1970").

[14] *See, e.g.*, H.R. Rep. No. 2093, 78th Cong., 2d Sess. 3, 10-11 (1945); H.R. Rep. No. 2739, 79th Cong., 2d Sess. 39-40 (1947); 93 Cong. Rec. 6594, 6595 (1947) (remarks of Sen. Taft).

funded candidates. Rather, the debate in 1971 revolved around attempts to extend the limitation further.

Several senators proposed amendments to extend section 9012(f) beyond political committees to other types of organizations and even to individuals[18] and Senator Cook proposed an amendment that would have converted the $1,000 limitation on expenditures into an absolute prohibition. 117 Cong. Rec. 42,626 (1971). In the debate over the Cook amendment, Senator Long voiced his concern that these proposals would extend the limitation too far to withstand constitutional scrutiny:

> Mr. President, I would hope this amendment would not be agreed to because I am ready to believe that there is going to be a constitutional challenge here. When you get it down to where nobody can do anything, even on an individual basis, and he is not permitted to do anything at all, that might raise a constitutional issue of freedom of speech.

117 Cong. Rec. 42,626 (1971). The Cook amendment was then defeated by the Senate, 117 Cong. Rec. 42,627 (1971), and none of the amendments to extend section 9012(f) beyond its narrow focus on political committees were incorporated in the statute.[19]

This legislative history illuminates congressional awareness of the sensitive area in which it regulated. Section 9012(f) was carefully drafted to ensure that political committees could not be "formed as a subterfuge," 117 Cong. Rec. 42,398 (1971) (remarks of Sen. Taft), to continue conducting the sort of privately financed election campaign in support of the candidate which it was the very object of the Fund Act to displace. Congress refused to extend the coverage of the provision beyond this specific threat to the purpose of the overall legislation because of concern that a greater restriction would improperly interfere with individual political speech. Thus, Congress "cautious[ly] advance[d], step by step," *FEC* v. *National Right To Work Committee*, 459 U.S. at 209, in developing the carefully balanced scheme embodied in the Fund Act, limiting the reach of the statute to ensure that it does not unnecessarily intrude on constitutionally protected activity. As noted *supra*, p. 13-14, this conscious determination of Congress that section 9012(f) is an appropriate and constitutional means to achieve the important governmental interests which this Court has already found to be served by the Fund Act, is entitled to deference. *Buckley* v. *Goldberg*, 453 U.S. at 64, 67; *International Assn. of Machinists* v. *FEC*, 678 F.2d at 1107, 1114.

[18] Senator Taft introduced an amendment to specify that section 9012(f) covered "any corporation, labor organization, partnership, association, political committee, political education committee or any other committee." 117 Cong. Rec. 42,397-98 (1971). Senator Miller introduced an amendment that would have extended section 9012(f) to cover expenditures by "any individual" as well as political committees. 117 Cong. Rec. 42,626 (1971).

[19] The Taft amendment was defeated in the Senate, 117 Cong. Rec. 42,403 (1971), and the Miller amendment was rejected by the Conference Committee. H.R. Rep. No. 708, 92d Cong., 1st Sess. 58 (1971).

2. *The experience of the 1980 election demonstrates that Congress' concerns were not illusory*

Following the decision of the three-judge district court in *Common Cause* v. *Schmitt*, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided Court*, 455 U.S. 129 (1982), that section 9012(f) was unconstitutional, several political committees proceeded to conduct expenditure campaigns during the 1980 presidential election. The activities of these political committees confirms Congress' judgment that political committees could be used as a vehicle to undermine the purposes of the Fund Act.

During the 1980 election cycle, each of the major party presidential candidates received $29.4 million from the Fund, while some $13.7 million was spent in independent expenditures. Almost $13 million of those independent expenditures were for the benefit of Ronald Reagan, most of it spent by a handful of multi-candidate political committees operated by the candidate's long time political allies. (Stipulations 126, 143, 154-155, 161-164

at J.A. 44, 48, 50, 51.) The Congressional Club, whose honorary chairman and fundraiser was Senator Jesse Helms, a Reagan delegate to the Republican convention, spent more than $4.5 million on independent expenditures in 1980 (Stipulations 104-112, 124-125, 166 at J.A. 40-42, 44, 52). NCPAC, for which Ronald Reagan had previously raised a substantial amount of money, was headed by John T. Dolan, brother of Ronald Reagan's chief speechwriter, and spent almost $2 million on behalf of the Reagan candidacy (Stipulations 40-43, 79, 143 at J.A. 30-31, 37, 48). FCM spent more than $2 million in support of Reagan (Stipulations 154-155 at J.A. 23) and Americans For Change and Americans For An Effective Presidency, both of which were established by Ronald Reagan's political allies, spent almost $2 million between them (Stipulations 112-125, 127-131, 166 at J.A. 42-44, 45, 52). Even with section 9012(f) on the books these five political committees were capable of increasing the expenditures supporting one of the publicly financed candidates by more than one third. This is, moreover, only an indication of the potential of this type of activity to eventually exceed and perhaps dwarf the limited official campaigns of the major candidates; as of July 1, 1983, there were 3,461 political committees, including independent committees as well as those operated by corporations and labor organizations, which could engage in independent spending to affect the presidential general election (Stipulation 165 at J.A. 52).

These massive expenditure campaigns were not conducted by mere groups of individuals joining together to express their political views, but by technologically sophisticated organizations, operated by political professionals closely associated with the candidate, who were able to effectively contour their campaigns to comport with the candidate's campaign strategy. They were able to accurately assess the official campaign strategy, and the official campaign's areas of strength and weakness, through information reported in the press (Stipulations 43-44, 88-101, 145 at J.A. 30-31, 38-40, 48). They were able to raise millions of dollars from hundreds of thousands of contributors through computerized solicitation programs that represented these independent campaigns as the alternative way to contribute to the Reagan campaign because the candidate could not legally accept contributions (FEC App. 83a n.54, Stipulations 49, 102, 108-10, 195 at J.A. 32, 40-42, 56).

Finally, it is clear that the efforts of these independent committees were considered helpful by the candidate, and that the Reagan Administration was appreciative. For example, individuals associated with the committees received presidential appointments (FEC App. 69a-71a, stipulation 123 at J.A. 44), and NCPAC was able to obtain closed door briefings with members of the Reagan cabinet, as well as the President himself, to aid in its fundraising efforts (Stipulations 50-54, 61-62, 122, 123 at J.A. 32, 34, 44).

The district court rejected this evidence as insufficient to prove corruption in the current administration.[17] This evidence was not submitted, however, to convict anyone of corruption, but to give an idea of the impact these political committees can have on a publicly financed presidential election, and to show that the same sort of special access and political favoritism that was dispensed to large contributors in the past now goes to the political professionals operating large expenditure campaigns to help the candidate get elected.[18] While, as the district court opined

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[17] The district court clearly erred in refusing to accept as true the adjudicative facts stipulated by the parties. It is well settled that when the parties to a lawsuit stipulate to a fact, the stipulation is binding on the court and requires the court to treat the stipulated fact as having been established by "the clearest proof." *Schwimmer v. Procidoro*, 349 F.2d 482, 484 (9th Cir. 1965). *See also Hatfield and Co. v. United States*, 197 U.S. 442, 446-447 (1905); *Vergona v. Merrill, Lynch*, 580 F.2d 974, 977 (9th Cir. 1978); *United States v. 27.10 Acres of Land*, 459 F.2d 291, 294 (10th Cir. 1972); *Stanley Works v. FTC*, 469 F.2d 498, 506 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973).

[18] Although none of the parties raised any objection to the admissibility of any of the stipulations, the district court was clearly went to great lengths to find many of them inadmissible

(FEC App. 70a-72a), individuals associated with these committees may actually have received political appointments because of competence, the public perception that these appointments might have resulted from their financial support instead is no different than when similar appointments were dispensed to large contributors. The purpose of the public financing system was to ensure that such public suspicions could not arise by eliminating the opportunity to provide the candidate with significant financial support. The Administration's aid to NCPAC's fundraising efforts also demonstrates that the President and his Administration noticed and appreciated the efforts made on their behalf, a perception which is confirmed by statements reported to have been made by individuals involved in the process (Stipulations 45, 49, 65, 72, 89-91, 132 at J.A. 31-32, 34-36, 38, 45-46). While expenditures by individuals may often prove to be of little help, as the Court suggested in *Buckley*, 424 U.S. at 47, it is highly unlikely that these sophisticated politicians, armed with computers and the detailed information about the candidate's strategies, tactics, strengths and weaknesses that are reported daily in the news media, would be unable to expend their vast resources in a way that substantially advances the candidate's chances of election. *See* FEC App. 78a.

The district court also found that these facts fail to support Congress' view that section 9012(f) was necessary because the court found it implausible that there

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under the Rules of Evidence, mostly on grounds of relevance (FEC App. 61a-73a). As noted in the text we would have little quarrel with the court's approach if this evidence had been submitted for the purpose of attempting to convict members of the Reagan administration of corruption; the stipulations do not prove, and were not intended to prove that there has been actual corruption in the current administration. While the district court might have concluded that the stipulations carry little weight under the court's unrealistically narrow view of what can give rise to an appearance of corruption (*see infra*, pp. 26-28), the stipulations cannot plausibly be found entirely irrelevant to the question of the nature of the relationship between government and political committees. *Cf. Republican National Committee* v. *FEC*, 487 F. Supp. at 297 n. 15, 301.

was any realistic danger that financial support of a presidential candidate could result in a *quid pro quo* to political committees like appellees. The court decided that only commercial favors to businesses could constitute a meaningful *quid pro quo*, so that there is nothing a president could give to an "ideological" political committee (FEC App. 77a, 96a); that business connected political committees could not reasonably be expected to be able to accumulate enough money from their contributors to provide appreciable support to a presidential candidate (FEC App. 98a); and that a president cannot effectively dispense favors to financial supporters in any event because "the president lives in a veritable fishbowl" (FEC App. 77a).

These conclusions find no support in any decision of this Court; to the contrary, this Court has had no trouble accepting the assumption underlying *all* of the federal campaign financing statutes that financial support of a candidate can lead to a corrupt *quid pro quo*, and that candidates can be coerced into altering their positions as candidates and actions in office in order to obtain it. *See Buckley* v. *Valeo*, 424 U.S. at 25, 26, 45. While the district court faulted the Commission for failing to prove that the Reagan administration had engaged in corruption, this Court has found that although "the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." *Id.* at 27. Moreover, contrary to the district court's assumption, the appearance that a president's support has been effectively purchased can arise whether or not the issue is of a commercial nature, and this Court has never suggested that Congress is required to limit its controls on campaign financing to commercial interests.[19] But even if the district court's

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[19] Indeed, most apparently "ideological" issues have an economic component that could lie behind a group's "ideological" sounding title and rhetoric. *Cf. Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 298 (1981). For example, opposition to

distinction were valid, it was demonstrably wrong in its assumption that political committees connected with commercial interests have a difficult time accumulating campaign funds. There are now some 1702 corporate PACs, with incomes totalling $39,539,381 during the first 18 months of the 1984 election cycle; 675 trade association PACs with incomes of $35,934,635; and 417 union PACs with incomes of $39,264,110. *Data Compiled from the Public Records of the Federal Election Commission* (lodged with the Court) at 142, 178, 366. This clearly represents a weighty accumulation of wealth that could substantially affect presidential elections.

Congress was plainly justified in concluding that these political committees pose a much greater danger to the election system than individuals. The level of spending of these few committees during the 1980 elections demonstrates their ability to exert a significant influence on the electoral process—an influence that no presidential candidate can afford to ignore. It would be "naive to think that these types of political activities are motivated at these levels by some academic interest in 'democracy' or other public service impulse." *Elrod* v. *Burns*, 427 U.S. 347, 385 (1976) (Powell, J., dissenting). In fact, one political committee candidly admitted in its brief to this Court in *Common Cause* v. *Schmitt*, 455 U.S. 129 (1982) that it expected to "earn some measure of loyalty from a candidate . . . [by] effectively advocat[ing] the candidate's election." Brief of Americans for Change in Nos. 80-847 and 80-[illegible], at 44.

Moreover, if all controls were removed, expenditures by such committees might well come to exceed the total allotment for a publicly funded candidate, *see* p. 24, *supra*, with the result that the candidate's own publicly funded campaign would become subordinated to the campaign activities of unaccountable, unauthorized political committees. This would return the candidates to the very position of dependence upon private funds which the Fund Act was designed to eliminate, and would split the election process to the point where it would be difficult for voters to distinguish the candidate's own positions from those pressed by his unaccountable supporters. Utilizing large aggregations of wealth to influence federal elections, and unaccountable to their contributors, these organizations represent a special threat to the electoral process that is similar in all material respects to the one identified in *FEC* v. *National Right To Work Committee*, 459 U.S. at 210. This Court rejected the argument of the corporation in that case, similar to the one made here, that Congress could not limit its political expenditures because it was merely an agent for the expression of its contributors' views:

> The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, . . . and there is no reason why it may not in this case be accomplished by treating unions, corporations, *and similar organizations* differently from individuals.

FEC v. *National Right To Work Committee*, 459 U.S. at 211 (emphasis added) (citations omitted).

D. Section 9012(f) Is Not Unconstitutionally Overbroad

The district court did not find that there were no applications of section 9012(f) that would be constitutionally valid; indeed, it seems to have conceded that the statute would not be unconstitutional as applied to campaigns on the scale of those conducted by the appellees in 1980 (FEC App. 78a, 94a-96a). Rather, the district court held section 9012(f) to be unconstitutionally overbroad because the possibility of its being applied to others "deters protected speech without potential to corrupt" (FEC App. 98a).

The overbreadth doctrine relied upon by the district court is a narrow exception to "the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *City Council* v. *Taxpayers for Vincent*, 104 S. Ct.

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nuclear power might be based either upon a concern for safety or upon an interest in a coal mine, an employee or stockholder, and support for a strong defense posture might be based either on a commitment to strengthening American foreign policy or on an interest in a defense plant.

at 2125. Based upon the notion that "the very existence of some broadly written statutes may have such a deterrent effect on free expression that they should be subject to challenge even by a party whose own conduct may be unprotected," the overbreadth doctrine permits facial invalidation of a penal statute "'which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.'" *Id.* at 2125 and n.16, quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940).

The overbreadth doctrine is "strong medicine" which "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). Moreover, overbreadth scrutiny has been applied less rigidly to statutes, like section 9012(f), "regulating conduct in the shadow of the First Amendment, but doing so in a neutral, nonexpressive manner." *Id.* at 614, *citing, inter alia, United States* v. *CIO*, 335 U.S. 106 (1948). It is not enough to invoke this doctrine that an application of the statute can be conceived that could give rise to a chilling effect on protected speech; the record must show that there is "a realistic danger that the statute *itself* will significantly compromise recognized First Amendment protection of parties not before the Court for it to be facially challenged on overbreadth grounds." *City Council* v. *Taxpayers For Vincent*, 104 S. Ct. at 2126. *Accord, Broadrick* v. *Oklahoma*, 413 U.S. at 615.

As we show below, the district court erred both in its conclusion that section 9012(f) reaches further than necessary to accomplish the purposes of the Fund Act and in its view that section 9012(f) substantially infringes on conduct protected by the First Amendment.

1. *Section 9012(f) is precisely drafted to regulate only private presidential campaigns by political committees*

The provisions of the Fund Act were not haphazardly arrived at; as shown *supra*, pp. 15-23, Congress "struggled" with all of the expenditure limits to arrive at a

"reasonable" balance. 117 Cong. Rec. 42,627 (1971) (remarks of Sens. Pastore and Long). Section 9012(f) was the subject of particular scrutiny in the debates, which make clear that the provision was enacted not to censor political expression but only to counter the threat that privately financed campaigns could be resurrected through the artifice of a nominally independent group formed by political allies of the publicly financed candidate. The words of the provision clearly evidence this narrow intent by limiting its coverage to expenditures that "would constitute qualified campaign expenses if incurred by" the candidate.

Section 9012(f) is aimed solely at political committees because by definition only a political committee is capable of amassing a private campaign chest by collecting the private contributions that would have gone to the candidate in the absence of public financing. While the definition of political committee is broad,[30] it does not exceed what is necessary to make the statute effective. In fact, it was adopted only after experience with a less inclusive definition proved inadequate to control contributions and expenditures affecting federal elections.[31] This

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[30] The term "political committee" is defined in the Fund Act to include "any committee, association or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence, the nomination or election of one or more individuals to federal . . . office." 26 U.S.C. § 9002(9). The definition in FECA, 2 U.S.C. § 431(4)(A), is similar:

> any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.

The Commission has promulgated regulations under Title 26 adopting the FECA definition, making clear that the coverage of the two statutes is intended to be identical. *See* 11 C.F.R. §§ 100.5 and 9002.5.

[31] Prior to the election reform statutes of 1971, the term "political committee" under the Federal Corrupt Practices Act had been defined as a group "operating in two or more states or a subsidiary of a national committee." 1967 *Hearings* at 200 (statement of Fred M. Vinson, Jr., Assistant Attorney General, Department of Justice). All state committees, all local committees, all committees in the Dis-

Court has previously recognized the importance of this definition of political committee to the campaign financing statutes and has not found it overbroad. To the contrary, the Court found that "[t]o fulfill the purposes of the Act," the concept of "political committee" need "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley* v. *Valeo*, 424 U.S. at 79. *See also United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1140 (2d Cir. 1972); *American Civil Liberties Union, Inc.* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973).[20]

Appellees NCPAC and FCM fall squarely within the core definition of political committee and represent the paradigm of what section 9012(f) was intended to control. Both organizations were established for the pri-

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brief of Columbia supporting federal candidates for public office were beyond the purview of the federal law and therefore operated unregulated. Since these organizations were not covered by former 18 U.S.C. § 608 (1970) (limiting contributions to political committees to $5,000), there was effectively "no limitation on the amount of money a single individual [could] contribute to a State or local committee supporting [a federal] candidate." 1967 *Hearings* at 390. "[T]he law was so studded with exceptions and so limited in its practical application as to render it virtually useless." *Id.* at 388. To meet this deficiency, Senator Cannon, a prominent supporter of the proposed public financing statute, introduced S. 1880 to broaden the definition of political committee to include any group that "supports a candidate for Federal office and which accepts contributions or makes expenditures exceeding of $1,000 during a calendar year." 118 Cong. Rec. 11373 (1967) (remarks of Sen. Cannon). Congress adopted this proposal in the 1971 legislation. *See* n. 20, *supra*.

[20] Consistent with this Court's view in *Buckley*, the Commission looks to the operation and purposes of the organization to determine whether an entity is a "political committee" under FECA. *See* Advisory Opinions 1982-33, 1982-5, 1980-116, 1979-44, 1979-41, 1979-4, reported respectively at 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5838, 5810, 5788, 5645, 5627 and 5293. When an organization or entity holds itself out as, and functions like, a political committee, actively soliciting contributions from a broad range of individuals well beyond the personal funds of the organizer or organizers to influence the outcome of a federal election, the entity becomes subject to the federal campaign financing statutes. To

mary purpose of influencing the election of candidates to federal office and are continuing enterprises which have been conducting their political businesses for a number of years (Stipulations 1, 2, 23, 25, 32 at J.A. 25, 28, 29). Both of them pursue this objective by, *inter alia*, making contributions to candidates they support and expenditures in support of, or against, a large number of candidates for federal, state and local office (Stipulations 3, 26 at J.A. 25, 28). As unconnected multicandidate political committees, *see* 2 U.S.C. § 441a(a)(4), both of them obtain their funds by soliciting the public for contributions. Both appellees are controlled by a small, self-perpetuating board of directors, and neither of them permits contributors to have any voice in the selection of candidates to support or oppose, or to participate in the activities of the committees in any way, other than as a passive source of funds. (Stipulations 12, 13, 15, 32-39 at J.A. 26-27, 29-30).

As discussed *supra*, pp. 24-25, these organizations are managed by sophisticated political operatives, who have been able to amass tremendous amounts of money through nationwide computerized political fundraising operations. They have solicited contributions from political supporters of the Republican candidate, presenting themselves as an alternative means of contributing to the candidate, since the candidate himself was precluded by the Fund Act from receiving contributions. They have conducted nationwide election campaigns, not merely to express the committee's support of the candidate, but consciously to supplement the candidate's own campaign strategies which are reported in detail in the news media. A handful of these committees in 1980 conducted sophisticated private campaigns scientifically designed to supplement the candidate's own campaign on a scale which the candidate cannot help but notice and appreciate. As a re-

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hold otherwise would be to interpret these statutes as they were prior to the 1971 election reform amendments, and return to an era where all but a few organizations, spending money to influence federal elections, operated outside the bounds of the campaign financing laws.

sult, the committees and their major adherents have obtained special access to the administration not available to the public.

The Commission has concluded that the statutory definition of political committee was directed at groups like appellees who collect contributions from others to finance their own political activities, as distinguished from groups of individuals pooling their money to engage jointly in direct political speech. *See* Advisory Opinion 1980-126, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577. The Commission has not sought to apply section 9012(f) in a manner inconsistent with this distinction. Thus, so long as the Commission's exclusive jurisdiction to enforce the Fund Act is preserved (*see* pp. 40-50, *infra*), there is no reason why groups of individuals should be deterred from engaging in joint political expression merely because of the existence of section 9012(f). No evidence has been produced indicating that section 9012(f) has actually chilled political expression by any such group of individuals, and any chilling effect the statute might have is dissipated by the fact that section 9012(f) provides no penalty for violations that are not "knowing and willful," and by the availability pursuant to 2 U.S.C. § 437f, of a binding advisory opinion from the Commission for anyone in doubt about the legality of their contemplated activities. *See Martin Tractor Company* v. *FEC*, 627 F.2d 375, 384-386 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980).[25]

In these circumstances, the political committees before the Court, which fall "squarely within the 'hard core' of the statute's proscriptions," should not be permitted in this suit to attack the constitutionality of section 9012(f) as if it had been applied to a group of individuals who pooled their resources to amplify their own political

[25] Section 437f was amended in 1979 to permit any "person" to obtain an advisory opinion. 2 U.S.C. § 437f(a)(1). *Compare Buckley* v. *Valeo*, 424 U.S. at 110.

speech. *Broadrick* v. *Oklahoma*, 413 U.S. at 608; *FEC* v. *National Right To Work Committee*, 459 U.S. at 211. This principle is particularly applicable in this case because both political committees before the Court are multicandidate committees, which by definition must have received contributions from at least 50 people, 2 U.S.C. § 441a(a)(4), and all of the political committees that challenged the validity of section 9012(f) during the 1980 presidential general election were also multicandidate committees (Stipulations 23, 113, 127 at J.A. 28, 42, 45). Since "[c]ontributions to [multi-candidate] committees are . . . distinguishable from expenditures made jointly by groups of individuals in order to express common political views," the Court "need not consider [the] hypothetical application" of section 9012(f) if it had been construed by the Commission "to limit the amount individuals could jointly expend to express their political views." *California Medical Association* v. *FEC*, 453 U.S. 182, 197 n.17 (1981).

2. *Section 9012(f) does not substantially infringe individual rights of political expression*

As this Court found in *Buckley* v. *Valeo*, 424 U.S. at 92-93, the Fund Act was "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the Fund Act] furthers, not abridges, pertinent First Amendment values." The central features of the Fund Act substantially enhance both public discussion of issues and citizen participation in electoral politics. Providing some $40 million in public money to the eligible candidates ensures that they have adequate funds to make their competing campaign messages known, and also frees up time they would otherwise have had to spend soliciting contributions for the purpose of campaigning. As shown *supra* pp. 11-12, 16, Congress also adopted the $1.00 tax checkoff system to provide a new, easier opportunity for millions of Ameri-

cans to participate in the financing of presidential election campaigns.

These achievements are important enough to justify associated limitations on political expenditures. *Republican National Committee* v. *FEC*, 487 F. Supp. at 285-86. In fact, as noted *supra* p. 9, and *infra*, pp. 37-38, this Court has not questioned controls in the campaign financing laws on expenditures by a variety of entities singled out by Congress for special regulation, particularly those controls contained in the public financing statutes.

What this Court struck down in *Buckley* v. *Valeo*, 424 U.S. at 39-51, was a limitation of political expenditures that applied across the board to individuals and every sort of group desiring to engage in political expression during any federal election. As we have shown, section 9012(f) is much narrower, and has no impact on expenditures by individuals, singly or jointly. In fact, citizens have unlimited freedom under the campaign finance statutes to make independent expenditures expressing support of, or opposition to, any candidate.[18] Individuals can contribute up to $1,000 directly to privately financed presidential candidates and, although they cannot contribute money directly to a candidate who chooses public financing, they are free to contribute their time and engage in volunteer activities in the candidate's campaign. Moreover, citizens can provide monetary support to the candidate's political party, which is permitted in turn to support the campaign through limited coordinated expenditures. Nothing in the Fund Act interferes with the

[18] Even relatively small amounts of money can buy newspaper, radio, and television ads to advocate the election of a candidate. For example, an individual can buy a 60-second spot on radio station KYW, the highest rated radio station in Philadelphia, during the peak listening period of the morning for approximately $400 and during the peak evening period for approximately $200. The average cost of a 60-second radio spot in Trenton, New Jersey, Harrisburg, Pennsylvania, Binghamton-Elmira, New York, Reading, Pennsylvania and Atlantic City, New Jersey ranges from $15 to $70. A 30-second spot on the NBC affiliate in Philadelphia during the "Today Show" costs only about $450. (J.A. 59-60.)

ability of individuals to associate by joining or contributing to organized groups; they can contribute up to the $5,000 permitted by 2 U.S.C. § 441a(a)(1)(C) to any political committee and can join other associations at will. Section 9012(f) is expressly limited so as not to affect the internal communications of such organizations and it explicitly preserves the ability of the news media to engage freely in political reporting and commentary. 26 U.S.C. § 9012(f)(2).[19] *See also* 2 U.S.C. §§ 431(9)(B)(i), (ii); 441b(b)(2)(A), (B).

The district court ignored this complex balance of complementary limitations and opportunities fashioned by Congress and refused to evaluate section 9012(f) as a component of the Fund Act (FEC App. 85a-87a). Instead, the district court looked at section 9012(f)'s provisions in isolation and concluded that, since it limits "expenditures" rather than "contributions," it seriously infringes central First Amendment rights (FEC App. 44a, 48a-57a). This approach was clearly erroneous; indeed,

[19] The district court (FEC App. 56a n. 35) misread the two statutory exceptions to section 9012(f). The exception in section 9012(f)(2)(B) for tax-exempt organizations only extends to communications between the organization and "its members" which expound the "views of that organization." Both Congress and this Court have long recognized the special nature of the membership relationship and the right of a member to expect and to receive information and guidance from the organization. *See, e.g., United States* v. *CIO*, 335 U.S. at 116; *Pipefitters* v. *United States*, 407 U.S. 385, 431 (1972); *FEC* v. *NRWC*, 459 U.S. at 204-6. Section 9012(f)(2)(B) draws this same distinction between an organization's communications and expenditures aimed at the general public, which are subject to section 9012(f)(1), and the internal communications directed at its membership which are not limited.

The exception in section 9012(f)(2)(A) for broadcasters and periodical publications reporting news or taking editorial positions merely ensures that the statute will not constrict reporting of political news or stifle editorial comment. Legislation providing such special protection of the press "is the rule, not the exception." *Buckley* v. *Valeo*, 424 U.S. at 93 n.127. This exemption is limited by its terms to "reporting the news" and "editorial comment"; it does not permit media organizations to engage in political campaigning apart from their normal media activities.

in *Buckley* v. *Valeo*, 424 U.S. at 108-109, this Court upheld expenditure limits in the context of the Fund Act, even though it had found similar expenditure limits unconstitutional standing alone, 424 U.S. at 51-59.

In addition, *Buckley* did not establish the simple rule followed by the district court, that the First Amendment protects political "expenditures" from limitation by Congress, but does not protect political "contributions." To the contrary, as discussed *supra*, pp. 9, 37-38, the Court has upheld limitations on expenditures in several contexts. Rather, the Court distinguished between two types of constitutional interests in *Buckley*—the right to spend one's own money to express one's political views constitutes direct speech lying at the core of the First Amendment, while "the transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S. at 21. This latter activity, subsequently labelled "speech by proxy" by a plurality of the Court in *California Medical Association* v. *FEC*, 453 U.S. at 196, does not involve the use of one's own resources to express one's views, so that regulation of this activity imparts primarily upon the exchange of money rather than upon the freedom to engage in political expression.

In contrast to the broad expenditure limitation struck down in *Buckley*, section 9012(f) does not limit anyone in the use of their own resources to express their own political views. The contributors to a political committee are free to spend as much as they want to publicize their political views, and the managers of the committee are equally free to spend their own money to publicize their views. The *only* activity limited by section 9012(f) is "the transformation of contributions into political debate" by the handful of managers of these committees. Although section 9012(f) focuses on the final stage of this transformation, while the contribution limitation upheld in *Buckley* focused on the beginning of that process, the constitutional analysis is identical: both stat-

utes impact only upon "speech by proxy" and leave direct speech untouched.

The record evidence of the appellees' operations demonstrates the tenuous relationship between the expenditures of a political committee and the political expression of its contributors. As discussed *supra*, p. 33, both these committees are organized to ensure that contributors have no impact on their operations other than as sources of operating funds. Contributors have no voice in selecting the directors or operating officers of the committees, in selecting the candidates to support or oppose, or in determining the content of the committees' advertisements. Indeed, they have no right to participate in the committee's activities at all, except to provide money with no strings attached. While contributors may be induced to send money by a solicitation asking for contributions to support a particular candidate, the contributors' money goes directly into the committees' general accounts. (Stipulations 5-8, 14, 27-30 at J.A. 25, 27, 28-29.) There is no basis for assuming, therefore, that a contributor's money will actually be used to support the candidate mentioned in the solicitation that induced him to contribute. In fact, most of the contributions collected by these committees are spent to finance more solicitations and to pay salaries, rent and other administrative expenses, and are never used for political speech of any kind (Stipulations 141-142, 144, 147, 153-154, 159-160 at J.A. 47-51). Thus, while it may be true that contributors to FCM and NCPAC would probably not contribute unless they agreed with the position stated in the committees' solicitations, "this sympathy of interests alone does not convert [the Committee's] speech into that of [the contributor." *California Medical Association* v. *FEC*, 453 U.S. at 196 (plurality opinion).

In sum, unlike the broad limitation on political spending by individuals and groups that was struck down in *Buckley*, section 9012(f) "responds precisely to the substantive problem which legitimately concerns the [Congress and] . . . curtails no more speech than is necessary

to accomplish its purpose." *City Council* v. *Taxpayers for Vincent*, 104 S.Ct. at 2332. Although section 9012(f) restricts political committees "without great financial resources, as well as those more fortunately situated," this Court has stated that it will not "second-guess" Congress' legislative judgment that the *potential* of a type of organization to adversely affect the integrity of the federal election process should be foreclosed by a prophylactic statute. *FEC* v. *National Right to Work Committee*, 459 U.S. at 210.[39] The district court thus plainly erred in holding section 9012(f) to be unconstitutionally overbroad on its face, and its decision must be reversed if Congress is to retain its long recognized authority to deal in a realistic way with the abuses in campaign financing that menace the integrity of our democratic government.

II. 26 U.S.C. § 9011(b) DOES NOT CREATE A PRIVATE CAUSE OF ACTION, IN THREE-JUDGE DISTRICT COURTS WITH DIRECT MANDATORY APPEAL TO THIS COURT, TO ENFORCE THE PROVISIONS OF THE FUND ACT AGAINST PRIVATE PARTIES

The district court erred for two reasons in assuming jurisdiction under 26 U.S.C. § 9011(b) over the private

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[39] Nor is section 9012(f) overbroad because it sets the limit on campaign expenditures by political committees at $1,000. It was acknowledged during the Congressional debates that "[w]hen you incur an expense to promote the candidacy of a presidential candidate, $1,000 is small." 117 Cong. Rec. 42,409 (1971) (remarks of Sen. Pastore). However, the purposes of the statute required that the limit be set low enough that it could not be circumvented by a proliferation of political committees that could cumulate expenditure limits. This Court concluded in *Buckley* v. *Valeo*, 424 U.S. at 30, 83, 105, that such choices are for Congress to make; indeed, it is difficult to imagine how a court would go about drawing such lines.

> Looked at by itself without regard to the necessity behind it the line or point seems arbitrary . . . but when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

Buckley v. *Valeo*, 424 U.S. at 83, n.111, quoting *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting).

suit between the Democratic Party and the appellees. First, there is no evidence that Congress intended 26 U.S.C. § 9011(b) to authorize private parties to sue other private parties to "implement or construe" the Fund Act, without the participation of the Commission, to which Congress assigned the primary responsibility to "administer, seek to obtain compliance with, and formulate policy" with respect to the Fund Act. 2 U.S.C. § 437c(b)(1). Second, the court erred in finding that the Democratic Party has Article III standing to maintain its suit, for the Democratic Party agrees with the Commission's announced view that section 9012(f) is valid and enforceable and Congress has explicitly chosen not to permit complainants to bypass the Commission and sue to enforce the provisions of the Fund Act against other private parties.

A. Congress Did Not Intend In 26 U.S.C. § 9011(b) To Authorize Suits Between Two Private Parties To "Implement or Construe" The Fund Act, The Administration of Which Congress Has Assigned To The Federal Election Commission

As the district court acknowledged (FEC App. 13a n.6), its only statutory basis for jurisdiction over the suit filed against appellees by the Democratic Party is 26 U.S.C. § 9011(b).[40] Although section 9011(b) plainly authorizes some of these plaintiffs[41] to invoke its provisions, the statute does not expressly state what parties they may bring such actions against. Instead, section 9011(b) is limited to actions "appropriate to implement or construe" the provisions of the Fund Act. There is no

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[40] The Democratic Party's complaint also asserted jurisdiction pursuant to 28 U.S.C. § 1331 but, as the district court concluded, "general federal question jurisdiction is insufficient to permit this three-judge district court to decide the case." (FEC App. 13a n.6).

[41] The Democratic National Committee is, in the words of the statute, the "national committee of any political party," and Edward Mezvinsky is an "individual eligible to vote for President." The Democratic Party of the United States does not appear to fall within the classes authorized to file suit under Section 9011(b)(1).

reason to believe that Congress intended that a private lawsuit, not involving the agency Congress assigned responsibility for interpreting, enforcing and administering the Fund Act, is an "appropriate" vehicle to "implement or construe" the provisions of that Act.

All actions brought pursuant to section 9011(b) are to be heard on an expedited basis by a three-judge district court, with direct appeal to this Court. Thus, interpretation of Section 9011(b) is governed by "the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interests of sound judicial administration." *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974). Pursuant to this policy, the Court has consistently required "'strict construction of statutes authorizing appeals to this Court.'" *Broad Political Action Committee* v. *FEC*, 455 U.S. 577, 580-581 (1982), *quoting Palmore* v. *United States*, 411 U.S. 389, 396 (1973). Just a few months ago the Court applied this overriding policy to refuse "'to give the surface literal meaning to a jurisdictional provision'" when that construction "'would not be consistent with the "sense of the thing" and would confer upon this Court a jurisdiction beyond what "naturally and properly belongs to it."'" *Heckler* v. *Edwards*, 104 S.Ct. 1532, 1538 (1984) (citations omitted).

There is nothing in the language or legislative history of section 9011(b) to indicate that Congress contemplated authorizing the convening of a three-judge court, with expedited direct appeal to this Court, at the behest of a party that has no quarrel with the manner in which the Commission is already construing and administering the Fund Act. The private right of action under section 9011(b) serves to ensure that private parties who question the manner in which the Fund Act is being administered have an opportunity to obtain a definitive resolution of the matter before it is too late to affect an upcoming election. *See* S. Conf. Rep. No. 553, 92d Cong., 1st Sess. 58-59 (1971); *Common Cause* v. *Schmitt*, 512 F. Supp. at 502. There is no warrant for assuming that

section 9011(b) was intended to authorize private parties who agree with the Commission's construction of the Act to file a suit against other parties to obtain judicial confirmation of the Commission's approach, but without the involvement of the Commission. *See* 26 U.S.C. § 9010(a) ("The Commission is authorized to appear in and defend against any action filed under Section 9011"). To the contrary, "Congress has legislated in no uncertain terms with respect to FEC dominion over the election law." *Common Cause* v. *Schmitt*, 512 F. Supp. at 502.[20]

Since the clear thrust of the statutory scheme is to allocate to the Commission primary responsibility for implementing and interpreting the Fund Act, the district court's broad interpretation of section 9011(b) to permit private parties to disregard the Commission entirely and litigate between themselves the meaning and implementation of the Fund Act is "'not . . . consistent with the "sense of the thing" and would confer upon this Court a jurisdiction beyond what "naturally and properly belongs to it"'" *Heckler* v. *Edwards*, 104 S.Ct. at 1538.

B. 26 U.S.C. §9011(b) Does Not Provide A Private Cause Of Action To Enforce The Fund Act

Even if the language of section 9011(b) were not construed to pretermit suits between private parties, the district court erred in concluding that the Democratic Party has Article III standing to maintain its suit. In order to maintain a suit in federal court plaintiffs must demonstrate, *inter alia*, that they have suffered an injury that will be redressed by a decision in their favor. Val-

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[20] *See, e.g.*, 2 U.S.C. §§ 437c(b)(1) ("The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to . . . chapter 95 . . . of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions."); 437d(a)(6), (8); 437f(a) (Commission empowered to issue advisory opinions "concerning the application of . . . chapter 95 . . . of title 26"); 437f(c)(2) (anyone who acts in accordance with a Commission advisory opinion "shall not, as a result of such act, be subject to any sanction provided by . . . chapter 95 . . . of title 26"); 437g (Commission empowered to enforce the provisions of the Fund Act).

ley Forge Christian College v. *Americans United For Separation of Church and State*, 454 U.S. 464, 472 (1982); *Larson* v. *Valente*, 456 U.S. 228, 242-43 (1982). The district court found only one basis upon which the Democratic Party could satisfy this "redressibility" requirement of Article III: resolution of the constitutionality of section 9012(f) now would enable the Democratic Party to expedite a later lawsuit to enforce that provision against the appellees during the election campaign.[*] We demonstrate below that the district court was clearly mistaken in finding that section 9011(b) authorizes a private cause of action to enforce the Fund Act. Therefore, the Democratic Party's only recourse for a violation of section 9012(f) during the election is filing a complaint with the Commission, and this right will not be affected by a declaration of section 9012(f)'s constitutionality, for the Commission has already announced its conclusion that that provision is valid and enforceable. *See* Advisory Opinions 1983-10 and 1983-11, reported at 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5715, 5716. Accordingly, the Democratic Party's suit should have been dismissed for lack of standing.[**]

In *Cort* v. *Ash*, 422 U.S. 66, 74-75 (1975), this Court found that the grant of "primary jurisdiction" over civil

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[*] The district court stated (FEC App. 20a):

> Whether private plaintiffs have standing in this declaratory judgment action turns largely on whether private plaintiffs may ultimately enforce the provisions of the Fund Act, including section 9012(f), by means of civil injunction actions brought during the final presidential campaign. If so, a judgment here that section 9012(f)'s substantive prohibitions are not unconstitutional on their face clears the way for rapid adjudication of disputes arising under section 9012(f), and thus benefits the plaintiffs.

[**] Of course, if the Commission had taken the position that section 9012(f) was unenforceable, the Democratic Party plaintiffs would have had standing to sue the Commission under 26 U.S.C. § 9011(b) to resolve this dispute and thus remove a roadblock to the relevant in having the Commission process an administrative complaint against the appellees under 2 U.S.C. § 437g. *See Larson* v. *Valente*, 456 U.S. at 243.

enforcement of the FECA to the Commission by former 2 U.S.C. § 437c(b) extinguished any private right of action to enjoin violations of that statute. As the Court observed in *Buckley* v. *Valeo*, 424 U.S. at 112 n.155, former 2 U.S.C. § 437c(b) gave the Commission "at the very least . . . the sole discretionary power 'to determine' whether or not a civil violation has occurred or is about to occur, and consequently whether or not informal or judicial remedies will be pursued." *Accord*, *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. at 37. In 1976, Congress amended section 437c(b) to vest the Commission with "exclusive primary jurisdiction" with respect to civil enforcement, and extended it to cover the Fund Act as well as FECA. 2 U.S.C. § 437c(b)(1) (1976).[*] Every other court to consider the question before this has followed this Court's holding in *Cort* and held that private causes of action are extinguished by section 437c(b)'s grant to the Commission of primary or exclusive jurisdiction over civil enforcement of the campaign finance laws. *McNamara* v. *Johnston*, 522 F.2d 1157, 1161-1162 (7th Cir. 1975), *cert. denied*, 423 U.S. 911 (1976); *Gabauer* v. *Woodcock*, 594 F.2d 602, 623 (8th Cir.) (en banc), *cert. denied*, 444 U.S. 841 (1979); *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 542-547 (D.C. Cir. 1980); *Common Cause* v. *Schmitt*, 512 F. Supp. at 501-503; *In re Federal Election Campaign Act Litigation*, 474 F. Supp. 1051 (D.D.C. 1979); *Dardin for U.S. Senate Committee* v. *FEC*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9147 (D.N.H. 1980).

The lower court in this case adopted an entirely different interpretation of section 437c(b)(1). Noting Con-

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[*] In 1979, the Act was amended to delete the word "primary," so that the Commission now has "exclusive jurisdiction" over civil enforcement of the campaign finance laws. 2 U.S.C. § 437c(b)(1). No one has suggested that the change from "exclusive primary jurisdiction" to "exclusive jurisdiction" was intended to dilute the authority granted the Commission. *See* FEC App. 10a n.10; *In Re Carter-Mondale Reelection Committee*, 642 F.2d 538, 545 n.9 (D.C. Cir. 1980).

grees' contemporaneous transfer of civil enforcement of the campaign financing statutes from the Attorney General to the Commission, the court concluded "that section 437c(b)(1) was enacted by Congress to make clear that only the FEC, and no other governmental authority, would have jurisdiction to enforce the two Acts." (FEC App. 19a). However, Congress explicitly stated that, as this Court had already concluded in *Cort* v. *Ash*, section 437c(b)(1) was intended to accord the Commission jurisdiction over matters within its special competence to the exclusion of all other tribunals.

> The phrase "exclusive primary jurisdiction" used to describe the congressional intent to centralize the civil enforcement of the Act in the Federal Election Commission is taken from the Supreme Court's decision in *San Diego Unions* v. *Garmon*, 359 U.S. 236 (1959). There the Court recognized that Congress, in enacting the National Labor Relations Act, "entrusted administration of the labor policy for the nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*Garmon*, 359 U.S. at 242). On that basis the Court stated that all complaints bottomed on an alleged violation of the NLRA are within that Agency's "exclusive competence" (*id.* at 245) and that *all other tribunals must therefore "yield to the primary jurisdiction of the National Board"* (*id.*). The Court's ruling in Garmon captures the essence not only of the NLRA's administrative scheme, but of this Act's enforcement procedures as well.

H.R. Rep. 917, 94th Cong., 2d Sess. 4 (1976) (emphasis added).[46] This statement was expressly adopted by the

[46] Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. at 242-243, quoting *Garner* v. *Teamsters C. & H. Local Union*, 346 U.S. 485, 490 (1953).

Conference Committee. H. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 35 (1976). The court below did not merely ignore this explicit statement of congressional intent, but criticized the D.C. Circuit for giving effect to it in *In Re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d at 545-546 n.9 (FEC App. 21a n.12).

Congress assigned exclusive enforcement responsibility to the Commission, and imposed a variety of procedures and restraints on the enforcement process, in order to ensure that the campaign finance statutes could not be misused for partisan purposes.

> [E]lection campaigns are the central expression of this country's democratic ideal. It is therefore essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse or for administrative action which does not comport with the intent of the enabling statute.
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> • • • • •
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> Together, the requirement of four votes for affirmative action, the broad investigatory powers granted . . . , the conciliation procedure mandated, and the substantial civil remedies provided represent a delicate balance designed to effectively prevent and redress violations, and to winnow out, short of litigation, insubstantial complaints and those matters as to which settlement is both possible and desirable.

H.R. Rep. No. 917, 94th Cong., 2d Sess. 3-4 (1976). The district court's attribution to Congress of an intention to pattern enforcement of the Fund Act after several statutes dealing with environmental matters (FEC App. 19a) demonstrates its complete failure to comprehend Congress' special sensitivity to the possibility of partisan misuse of the campaign financing laws.

Nothing in 2 U.S.C. § 437d(e), so heavily relied upon by the district court (FEC App. 19a-21a), is inconsistent with the conclusion of this Court and the other lower courts that the Commission's exclusive jurisdiction under

2 U.S.C. § 437c(b)(1) over civil enforcement of the campaign financing laws precludes private causes of action to enforce those statutes. Section 437d(e) provides that the Commission's authority to bring suit under section 437g(a)(6) is "the exclusive civil remedy for the enforcement of the provisions of this Act," but that section says nothing about the Fund Act. From this congressional silence alone, the district court concluded that Congress intended section 437d(e) and 26 U.S.C. § 9011(b) to be complementary, permitting a private right of action to enforce the Fund Act, but not the FECA. (FEC App. 19a-21a).[34] However, section 437d(e) refers only to the *remedy* for violations; it says nothing about who is authorized to pursue the remedy.[35] Section 437c(b)(1) grants the Commission "the sole discretionary power to determine" what remedies will be pursued, *Buckley* v. *Valeo*, 424 U.S. at 112 n.153; section 437d(e) simply recognizes that while the elaborate procedures of 2 U.S.C. § 437g provide the only remedy for violations of the FECA, the Commission has been given several additional remedies for violations of both the Fund Act and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. *See* 26 U.S.C. §§ 9010(b), (c); 9040(b), (c).

Although the district court acknowledged that the question was "far from clear," and that Congress had used the word "enforce" elsewhere in these statutes when it referred to actions to correct violations (FEC App. 27a), it nevertheless interpreted the word "implement" in section 9011(b) to include actions to "enforce" the Fund Act. By this construction of an admittedly ambiguous term in the statute, and without reference to any supporting legislative history, the district court attributed to

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[34] The district court offered no suggestion as to the status of the Commission's jurisdiction over enforcement of the Presidential Primary Matching Payment Account Act, which is neither mentioned in 2 U.S.C. § 437d(e) nor covered by 26 U.S.C. § 9011(b).

[35] "[A] remedy is the means employed to enforce a right or redress an injury." *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918) (emphasis added).

Congress the unprecedented step of authorizing all of the millions of voters in the United States to bypass the detailed administrative enforcement procedures set out in 2 U.S.C. § 437g and institute expedited enforcement proceedings against political opponents, before a three-judge court, with direct appeal to this Court. Since the term "implement or construe" in section 9011(b) can be interpreted in a manner that does not do violence to Congress' explicit intention to accord exclusive jurisdiction over enforcement of the Fund Act to the Commission, the "overriding policy" of narrowly interpreting statutes that add to this Court's mandatory docket (*see* p. 42, *supra*) requires that the district court's broad construction of that provision be rejected. As several other lower courts have concluded, section 437c(b)(1)'s grant of exclusive jurisdiction to the Commission cannot be avoided merely by drafting an enforcement complaint in the terms of another statute.

> Congress has explicitly expressed its desire to have the FEC engage in methods of conference, conciliation and persuasion before litigation ensues over any federal election laws. . . . We should not permit circumvention of such negotiation under the guise of a parallel cause of action.

In re Carter-Mondale Reelection Committee, 642 F.2d at 543, *quoting Gabauer* v. *Woodrock*, 594 F.2d at 673. *See also*, *McNamara* v. *Johnston*, 522 F.2d at 1162.

Since there is no private right of action to enforce the Fund Act, the Democratic Party's lawsuit should have been dismissed for lack of standing, even under the district court's analysis. While a declaration of the constitutionality of section 9012(f) will benefit the Commission both by facilitating future enforcement actions and by enabling the Commission to more effectively fulfill its mandate to encourage voluntary compliance with section 9012(f), *see* 2 U.S.C. § 437g(a)(4)(A)(i), such a declaration will not alter the position of the Party in any way.[36]

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[36] It is possible for the Court to avoid resolving the controversy over the district court's jurisdiction to entertain the Democratic

CONCLUSION

For the reasons set forth above, the Court should reverse the judgment of the United States District Court for the Eastern District of Pennsylvania and hold that 26 U.S.C. 9012(f) does not violate the First Amendment to the Constitution of the United States. The Court should also reverse the lower court's jurisdictional decision and hold that 26 U.S.C. § 9011(b) does not afford a private right of action to enforce the Fund Act.

Respectfully submitted,

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JULY 2, 1984

Party's suit by following the precedent of *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1962). There, as here, the Court was presented with two lawsuits presenting the same substantive issue. A serious jurisdictional challenge was raised against one party's right to sue, but not against the other party's right to sue. The Court decided to resolve the substantive issue in the case that presented no jurisdictional issue, 372 U.S. at 15-16, and vacated and remanded the other case to the district court with instructions to dismiss the complaint. *Id.* at 22. *See also*, *Common Cause* v. *Schmitt*, 512 F. Supp. at 501. Although the same course is open to the Court here, we believe that the potential for partisan abuse of the campaign financing laws resulting from the district's court's misinterpretation of section 9011(b) is important enough to warrant resolving the issue in this case.

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JOINT APPENDIX

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Nos. 83-1032 and 83-1122

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL., APPELLANTS,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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APPEAL DOCKETED IN NO. 83-1122—JANUARY 6, 1984
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CHRONOLOGICAL LIST OF DOCKET ENTRIES

FEC

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,

C.A. 83-2823 (JG) (Three-Judge Court)

United States District Court for the Eastern District of Pennsylvania:

June 14, 1983—Complaint filed

June 14, 1983—Summons exit (mailed to counsel)

June 14, 1983—Plaintiff's Motion to Constitute Three-Judge Court and Expedite Proceedings and Memorandum of Points and Authorities in Support, cert. of service, filed.

June 29, 1983—Democratic Party of the U.S. and Democratic National Committee's Motion to Permit Additional Discovery on the Merits and on the Issues of Personal Jurisdiction and Venue, memo, cert. of service, filed (83-2329)

June 29, 1983—Democratic Party of the U.S. et al's Motion for Modification of Briefing Schedule, memo in support, cert. of service, filed. (83-2329)

June 30, 1983—Plaintiff's Motion to Establish a Consolidated Briefing Schedule and Points and Authorities in Support Thereof, cert. of service, filed (83-2329)

July 1, 1983—Order dated 6/30/83 that paragraphs 1 through 4 of the court's order dated 6/7/83 is modified as follows: By 7/15/83 plaintiffs shall inform the court in writing re: their status as a party to these civil actions, plaintiff's opposition to any motions to dismiss or for change of venue shall be filed by 7/15/83, by 7/22/83 defendants shall answer the FEC complaint, filed (83-2329). 7/5/83 entered & copies mailed.

July 12, 1983—Amended complaint, filed. (83-2329).

July 13, 1983—Common Cause's Motion to Participate as Amicus Curiae, memo in support, cert. of service, filed. (83-2329).

July 18, 1983—National Conservative Political Action Committee's answers to plaintiffs' first set of interrog., filed.

July 18, 1983—National Conservative Political Action Committee's answers to plaintiffs' second set of requests for admissions, filed.

July 18, 1983—Democratic Party et al's Response to defendants' Motion to Dismiss or For change of Venue, filed. (83-2329).

July 18, 1983—Democratic Party et al's Response to Federal Election Commission's Motion to Dismiss, filed. (83-2329).

July 20, 1983—Order that by 8/1/83 responding parties shall file their responses to the amended complaint of the National Democratic Party and their answers to defendants' motion to dismiss, etc., filed. (83-2329). 7/21/83 entered & copies mailed.

July 25, 1983—Defendants' Motion For Change Of Venue, Statement Of Points And Authorities In Support, cert. of service, filed.

July 28, 1983—Answer of National Conservative Political Action Committee and Fund for a Conservative Majority, filed. (83-2329).

August 2, 1983—Plaintiff's supplemental memorandum of points and authorities in support of its motion to dismiss, filed.

August 2, 1983—Plaintiff's memorandum and authorities in opposition to defendants' motion for change of venue, filed.

August 3, 1983—Defendants' Motion To Dismiss Amended Complaint or For Change Of Venue, Statement Of Points and Authorities in Support, cert. of service, filed. (83-2329).

August 3, 1983—Defendants' Motions To Dismiss Plaintiffs' Amended Complaint or For Change Of Venue, Statement Of Points And Authorities in Support, cert. of service, filed.

August 10, 1984—The Democratic Party, et al's response to the Federal Election Commission and defendants' motion to dismiss the amended complaint or for change of venue, filed. (83-2329).

August 19, 1983—Order that an oral argument on all outstanding motions is set for 9-13-83 at 2:30 p.m., filed. (83-2329). 8/22/83 entered & copies mailed.

August 24, 1983—Order granting motion of Common Cause to Participate Amicus Curiae, filed (83-2329). 8/24/83 entered & copies mailed.

August 25, 1983—Order that the Hon. Edward R. Becker, and Hon. Clifford Scott Green sit with the Honorable James T. Giles as members of the court for the hearing and determination of this matter, filed. 8/26/83 entered and copies mailed.

September 6, 1983—Supplemental Brief of Common Cause, filed.

September 8, 1983—National Conservative Political Action Committee and Fund for a Conservative Majority's Supplemental Brief, Certificate of Service, filed.

September 19, 1983—Hearing re: 9/13/83 outstanding motions—C.A.V., filed. (83-2329).

September 19, 1983—Order 9/16/83 that the Federal Election Commission's Motion to Dismiss Plaintiff's Amended Complaint, C.A. 83-2329, is Denied, the Motions of National Conservative Political Action Committee ("NCPAC") et al. to Dismiss Plaintiffs' Complaint and Amended Complaint or For Change of Venue is Denied, NCPAC and FCM's Motion For Change of Venue of 83-232[illegible] filed by the FEC is Denied, a Pretrial Conf. is fixed for 9/26/83 at 5 p.m., courtroom 8B, etc., filed. (83-2329). 9/20/83 entered and copies mailed.

September 30, 1983—Order Dated 9/28/83 that a Factual Record be submitted by 10/7/83, by noon on 10/17/83 plaintiffs shall file opening brief with a copy to judges' chambers, and by noon on 10/24/83 defendants shall file a reply brief with a copy to judges chambers, filed. (C.A. 83-2329). 10/3/83 entered & copies mailed.

October 14, 1983—Joint Stipulation of Fact, filed. (83-2329).

October 14, 1983—Defendants' proffers of evidence, filed. (83-2329).

October 14, 1983—Joint Stipulation of Fact with exhibits, filed. (83-2329).

October 14, 1983—Plaintiffs' proffer of facts not stipulated to, filed. (83-2329).

October 14, 1983—Sheldon Scharfberg's affidavit, filed. (83-2329).

October 14, 1983—Democratic Party of the U.S. et al's Motion to Admit Into Evidence Survey of Public Attitudes Toward Presidential Campaign Financing, memo in support, atndavit, filed. (83-2329).

October 17, 1983—Plaintiff's opening brief on the merits, filed. (83-2329).

October 17, 1983—The American Civil Liberties Union, et al's Motion For Leave To Participate As Amicus Curiae, memo in support, cert. of service, filed. (83-2329).

October 17, 1983—The American Civil Liberties Union et al's Memorandum of Law, filed. (83-2329).

October 17, 1983—Defendants' brief on the merits, filed. (83-2329).

October 17, 1983—The Democratic National Committee's brief in support of the constitutionality, filed. (83-2329).

October 17, 1983—Brief of Amicus Curiae Common Cause, filed. (83-2329).

October 19, 1983—Transcript of testimony 9/26/83, filed. (83-2329).

October 20, 1983—Order that the Motion of Plaintiff Democratic National Committee to Admit Into Evidence Survey Of Public Attitudes Toward Presidential Campaign Financing Is Denied, filed. (83-2329). 10/21/83 entered and copies mailed.

October 20, 1983—Order that All Parties Are Notified That The Final Hearing and Argument In This Matter shall be held on 10/27/83 Commencing at 9:30 a.m. in Courtroom 8B, filed. (83-2329).

October 20, 1983—Order that the Motion Of The American Civil Liberties Union To Appear As Amicus Curiae is Granted, filed. (82-2329). 10/21/83 entered and copies mailed.

October 24, 1983—Reply of the Federal Election Commission to defendants' brief on the merits, filed. (83-2329).

October 24, 1983—Defendants' brief in reply to plaintiffs' opening brief, filed. (83-2329).

October 24, 1983—Reply brief of Amicus Curiae Common Cause, filed. (83-2329).

October 26, 1983—Supplemental Memorandum of Law of the American Civil Liberties Union, et al. addressing the plausibility of a narrowing construction of 26 U.S.C. § 9012 (f), filed. (83-2329).

October 27, 1983—Transcript of testimony 9/13/83, filed. (83-2329).

October 27, 1983—Defendants' Proposed Findings of Fact, filed. (83-2329).

October 31, 1983—Hearing & Argued sur: Motions—C.A.V. 10/27/83, filed. (83-2329).

November 14, 1983—Transcript of testimony 10/27/83, filed. (83-2329).

December 12, 1983—Opinion Becker, Circuit Judge, Green, J. & Giles, J. & Order that Judgment is Entered For the Defendants, filed. 12/12/83 entered & copies mailed.

December 15, 1933—Plaintiffs the Democratic Party of the United States et al.'s Notice of Appeal to the Supreme Court of the United States, filed.

December 16, 1983—Plaintiffs Federal Election Commission's Notice of Appeal to the Supreme Court of the United States, certificate of service, filed.

January 3, 1984—Letter dated 12/30/83 from the Supreme Court of the United States with certificate enclosed stating that case (83-1032) is now pending before them, filed. (83-2329).

CHRONOLOGICAL LIST OF DOCKET ENTRIES

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.

C.A. 83-2329 (JG) (Three-Judge Court)

United States District Court for the Eastern District of Pennsylvania:

May 16, 1983—Complaint filed.

May 16, 1983—Summons exit.

May 16, 1983—Motion and Order specially appointing Ervin D. Sacks to serve summons and complaint upon defendants, filed. 5/16/83 entered & copies with summons to counsel.

May 16, 1983—Motion to Constitute Three-Judge Court and Expedite Proceedings, Memo. in Support, Cert. of Service, filed.

May 16, 1983—Summons returned with affidavit of service by Ervin D. Sacks re: served U.S. Attorney on May 16, 1983, filed.

May 23, 1983—Order Constituting a Three-Judge Court, Seitz, Chief Judge, Third Judicial Circuit designating Judge Green, Judge Becker, and Judge Giles for the hearing and determination etc., filed. 5/23/83 entered & copies mailed.

June 7, 1983—Motion of the Federal Election Commission For Leave To Intervene, Memo. of Points and Authorities, cert. of service, filed.

June 7, 1983—Acknowledgement of receipt of summons and complaint by Fund For A Conservative Majority re: received 5-20-83, filed.

June 7, 1983—Acknowledgement of receipt of summons and complaint by National Conservative Political Action Committee re: received 5-26-83, filed.

June 8, 1983—Order dated June 7, 1983 that by June 17, 1983 Defendants shall answer the Complaint etc., by July 1, 1983 Defendants shall file a reply to any Motion to Dismiss and by July 11, 1983 Defendants may file a Brief, etc., Plaintiffs Request for Expedited Discovery is granted but shall be limited to questions regarding the actual solicitation of funds, etc., clerk is directed to send copies of this order and all subsequent filings to Judge Becker, and Judge Green, etc., filed JG 6/9/83 entered & copies mailed.

June 9, 1983—Plaintiffs' first set of requests for admissions to Fund For A Conservative Majority, filed.

June 9, 1983—Plaintiffs' first set of requests for admission to NCPAC, filed.

June 16, 1983—Plaintiffs' Motion to Consolidate and Response To Motion of Federal Election Commission for Leave To Intervene, Brief in Support, filed with affidavit of John T. Dolan.

June 20, 1983—Defendants' Motion to Dismiss or For Change of Venue, Joint Statement of Points and Authorities in Support Thereof, filed.

June 20, 1983—Answers of Defendant National Conservative Political Action Committee, et al. to plaintiffs' first set of requests for admissions, with cert. of service, filed.

June 22, 1983—Motion of Intervenor, Federal Election Commission to Dismiss, Memo. of Points and Authorities, cert. of service, filed.

June 22, 1983—Order that 83-2823 is Consolidated for all Purposes with 83-2329 etc., filed 6/23/83 entered and copies mailed.

June 22, 1983—Order that the Commission's Motion To Intervene is granted and that the Commission receive notice of all proceedings and be served with copies of all pleadings filed herein, filed. 6/23/83 entered & copies mailed. JG

June 23, 1983—Affidavit of Robert C. Heckman in support of FCM's Motions to Dismiss or to Change Venue, etc., filed.

June 27, 1983—NCPAC's Opposition to Plaintiffs' Motion To Consolidate, filed.

June 29, 1983—Plaintiff's Motion To Permit Additional Discovery on the Merits and on the Issues of Personal Jurisdiction and Venue, Memo. in Support, filed.

June 29, 1983—Plaintiff's Motion For Modification of Briefing Schedule, Memo. in Support, filed.

June 30, 1983—Federal Election Commission's Motion To Establish a Consolidated Briefing Schedule and Points and Authorities In Support Thereof, cert. of service, filed.

July 1, 1983—Order that paragraphs 1 through 4 of the Court's order dated 6/7/83 is modified: Plaintiffs shall inform the court in writing regarding their status as a party to the action by 7/15/83; Plaintiffs Opposition to any Motion shall be filed by 7/15/83; Defendants shall answer the FEC complaint by 7/22/83, filed. 7/5/83 entered & copies mailed.

July 12, 1983—Amended complaint filed.

July 13, 1983—Motion of Common Cause to Participate As Amicus Curiae, Memo. filed.

July 18, 1983—NCPAC's answers to first set of interrogatories, filed.

July 18, 1983—NCPAC's answers to second set of requests for admissions, filed.

July 18, 1983—Plaintiff's response to Motion to Dismiss or for Change of Venue, filed.

July 18, 1983—Plaintiff's response to Federal Election Commission's Motion to Dismiss, filed.

July 20, 1983—Order that by 8-1-83 responding parties shall: File their Responses to the Amended Complaint of the National Democratic Party filed 7/12/83 and file their Answers to Defendants' Motion to Dismiss the FEC Complaint, by 8-10-83, any response must be filed to Defendants Motion(s) to Dismiss the FEC Complaint and/or the Amended Complaint of the National Democratic Party, etc., filed. 7/21/83 entered and copies mailed.

July 25, 1983—Defendants' Motion for Change of Venue, Memo., certification, filed.

July 28, 1983—Defendants' answer to Federal Election Commission's complaint, filed.

August 2, 1983—Federal Election Commission's Supplemental Memo in Support of Motion to Dismiss 83-2329, filed.

August 2, 1983—Federal Election Commission's Memo. in Opposition to Motion For Change of Venue, filed.

August 3, 1983—Defendants' Motion To Dismiss Amended Complaint or For Change of Venue, Statement of Points and Authorities In Support, cert. of service, filed.

August 10, 1983—Plaintiff's Response to Motion to Dismiss Amended Complaint or For Change of Venue, filed.

August 19, 1983—Order that an oral argument on all outstanding motions is set for 9/13/83 at 2:30 p.m., filed. 8/22/83 entered and copies mailed.

August 24, 1984—Order granting Motion of Common Cause To Participate Amicus Curiae, filed. 8/24/83 entered and copies mailed.

September 6, 1983—Supplemental Brief of Common Cause, filed.

September 6, 1983—Plaintiff's Supplemental Brief, filed.

September 7, 1983—Supplemental Brief of Federal Election Commission, filed.

September 8, 1983—National Conservative Political Action Committee and Fund For A Conservative Majority's Supplemental Brief, certificate of service, filed.

September 19, 1983—Argued sur: outstanding motions, C.A.V., filed.

September 19, 1983—Order that FEC's Motion To Dismiss Amended Complaint, C.A. 83-2329 is denied, Motions of NCPAC & FCM To Dismiss Complaint & Amended Complaint or For Change of Venue is Denied, & NCPAC & FCM's Motion For Change of Venue of C.A. 83-2823 is denied. Pre-trial con-

ference scheduled for 9/26/83 at 5:00 p.m., filed. 9/20/83 entered and copies mailed.

September 23, 1983—Supplemental brief of Federal Election Commission re: need for development of factual record, filed.

September 26, 1983—Letter to Honorable Edward R. Becker, et al., from counsel for Amicus Curiae Common Cause re: development of factual record, filed.

September 27, 1983—Argued sur: discovery, filed.

September 30, 1983—Order that factual record be submitted by 10-7-83, by noon on 10-17-83 plaintiffs shall file opening brief with a copy submitted to Judge Giles' chambers, by noon on 10-24-83, defendants shall file reply brief, with copy submitted to Judge Giles' chambers, filed. 10/3/83 entered and copies mailed.

October 7, 1983—Answer of National Conservative Political Action Committee, et al., cert. of service, filed.

October 14, 1983—National Conservative Political Action Committee and Fund For A Conservative Majority's proffers of evidence, cert. of service, filed.

October 14, 1983—Joint Stipulation of Fact, exhibit books, Vol. I through III, filed.

October 14, 1983—Joint Stipulation of Fact, Exhibit 140, filed.

October 14, 1983—Plaintiff's proffer of facts not stipulation to, filed.

October 14, 1983—Affidavit of Sheldon Scharfberg, filed.

October 14, 1983—Plaintiff's Motion to Admit into Evidence Survey of Public Attitudes Toward Presidential Campaign Financing, Memorandum, Affidavit of Burns W. Roper, filed.

October 17, 1983—Federal Election Commission's opening Brief on the Merits, cert. of service, filed.

October 17, 1983—Motion of the American Civil Liberties Union and The American Civil Liberties Union, Greater Philadelphia Branch for Leave to Participate As Amicus Curiae, Memorandum, cert. of service, filed.

October 17, 1983—Memorandum of Law of The American Civil Liberties Union and the American Civil Liberties Union, Greater Philadelphia Branch, Amici Curiae, filed.

October 17, 1983—Defendant's Brief on Merits, cert. of service, filed.

October 17, 1983—Brief of Amicus Curiae Common Cause, cert. of service, filed.

October 17, 1983—Brief of The Democratic National Committee in Support of the Constitutionality of 26 U.S.C. § 9012 (f), filed.

October 19, 1983—Transcript of 9-26-83, filed.

October 20, 1983—Order that plaintiff's Motion to Admit Into Evidence Survey of Public Attitudes Toward Presidential Campaign Financing is denied. 10/20/83 entered & copies mailed.

October 20, 1983—Order that Final Hearing and Argument is scheduled for 10-27-83 at 9:30 a.m., filed. 10/20/83 entered & copies mailed.

October 20, 1983—Order that Motion of American Civil Liberties Union to Appear as Amicus Curiae is granted, filed.

October 24, 1983—Defendants' brief in reply to plaintiffs' opening briefs, cert. of service, filed.

October 24, 1983—Reply of the Federal Election Commission to defendants' Brief on the Merits, cert. of service, filed.

October 27, 1983—Transcript of 9-13-83, filed.

October 27, 1983—Defendants' Proposed Findings of Fact, filed.

October 31, 1983—Argued sur: C.A.V., 10/27/83, filed.

November 14, 1983—Transcript of 10-27-83, filed.

December 12, 1983—Opinion Becker, Circuit Judge, Green, J. & Giles, J. & Order that Judgment is Entered for the Defendants, filed.

December 15, 1983—Plaintiffs' Notice of Appeal to Supreme Court of the U.S., filed.

December 16, 1983—Federal Election Commission's Notice of Appeal to the Supreme Court of the U.S., filed.

January 3, 1984—Letter from Supreme Court of the U.S. with copy of Certificate of filing of case (Supreme Court No. 83-1032) and is now pending, etc., filed.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. ——

Three-Judge Court

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
PLAINTIFF,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE,
1500 Wilson Boulevard
Arlington, Virginia 22209

and

FUND FOR A CONSERVATIVE MAJORITY
302 Fifth Street, N.E.
Washington, D.C. 20002
DEFENDANTS.

Expedited Pursuant to
26 U.S.C. § 9011(b)(2)

COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this court is invoked under 28 U.S.C. § 1345 as an action commenced by an agency of the United States expressly authorized to sue by an act of Congress. This action is instituted pursuant to the Presidential Election Campaign Fund Act ("Fund Act"), which provides that the Federal Election Commission may institute in the United States district courts such actions,

including those for declaratory relief, as may be appropriate to implement or construe provisions of the Fund Act. 26 U.S.C. §§ 9011(b)(1) and (2), 9010(c).

2. Convening of a three-judge district court to hear and make a determination in this action for declaratory judgment brought to implement and construe a provision of the Fund Act is required by 26 U.S.C. §§ 9011(b)(2) and 9010(c). Those statutory provisions also require that this action be heard and determined on an expedited basis.

3. Venue is properly found in the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391(b) and (c).

PARTIES

4. Plaintiff Federal Election Commission (hereinafter "the Commission") is the independent agency of the United States vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.*, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. The Commission is also vested with primary and exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c(b)(1), 437d; 26 U.S.C. §§ 9005(a), 9007(a) and (b), 9010(c), 9011(b), 9036(a), 9038(a) and (b), 9040(b), (c) and (d).

5. Defendant National Conservative Political Action Committee ("NCPAC"), is a political committee, as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). NCPAC filed its Statement of Organization with the Commission on October 10, 1975. NCPAC is also a multicandidate political committee registered with the Commission. 2 U.S.C. §§ 433, 441a(a)(4); 11 C.F.R. § 100.5(e)(3). The Chairman of NCPAC is designated as John T. Dolan.

6. Defendant Fund For A Conservative Majority ("FCM"), is a political committee, as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). FCM originally registered with the General Accounting Office as a political committee in 1972 as the "Young Americans' Campaign Committee". On October 13, 1976, FCM filed an amendment changing its name to Fund For A Conservative Majority. FCM is also a multicandidate political committee registered with the Commission. 2 U.S.C. § 433, 441a(a)(4); 11 C.F.R. § 100.5(e)(3). The Chairman of FCM is designated as Robert C. Heckman.

STATEMENT OF CLAIM

7. Pursuant to 26 U.S.C. §§ 9003(a) and (b), 9004(a)(1) and 9006, the presidential nominees of the Democratic and Republican parties will be eligible to receive public federal funding of their campaigns in the 1984 general election. *See* 26 U.S.C. § 9002(2), (4) and (6), 9003(b), and 9004(a)(1). Upon information and belief, the candidates nominated by both the Democratic and Republican parties will elect to request public financing of their general election campaigns pursuant to the provisions of section 9005 of the Fund Act. 26 U.S.C. § 9006.

8. Section 9012(f) of the Fund Act, entitled "Unauthorized expenditures and contributions," provides with respect to committee expenditures to support publicly financed candidates that:

> it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

26 U.S.C. § 9012(f)(1).

9. Defendants are political committees within the meaning of 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9).

Both defendants have publicly stated their intention knowingly and willfully to expend in excess of $1,000 prior to November, 1984, in support of the election of the candidate for President nominated by one of the major political parties. *See* 26 U.S.C. § 9002(6).

10. Such expenditures, to be made by these political committees to further the election of a major party presidential candidate funded pursuant to 26 U.S.C. § 9006(b), will be expenditures "which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000." 26 U.S.C. § 9012(f)(1). *See also* 26 U.S.C. § 9002(1), (4) and (11).

11. The Commission, seeking to fulfill its statutory authority to litigate questions involving the construction, implementation and validity of the Fund Act, *see* 2 U.S.C. §§ 437c(b)(1) and 437d(a)(6), institutes this action pursuant to 26 U.S.C. §§ 9011(b) and 9010(c) in order to obtain a declaration implementing and construing section 9012(f) of the Fund Act as prohibiting the conduct defendants will undertake, as described in paragraph 9 and 10, above.

WHEREFORE, Plaintiff Federal Election Commiasion prays that this court:

(1) promptly convene a three-judge district court pursuant to 26 U.S.C. §§ 9011(b)(2) and 9010(c);

(2) declare that the expenditures defendants intend to undertake in the 1984 general election in support of the publicly funded campaign of the Presidential nominee of one of the major political parties, are prohibited by and would be in violation of 26 U.S.C. § 9012(f)(1);

(3) declare that 26 U.S.C. § 9012(f)(1) as applied to the defendants is constitutional;

(4) order such other and further relief as the court deems appropriate.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
Assistant General Counsel

/s/ Richard B. Bader
RICHARD B. BADER
Assistant General Counsel

/s/ Jeffrey H. Bowman
JEFFREY H. BOWMAN
Attorney

June , 1983

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 20463
(202) 523-4043

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Consolidated Civil Actions No. 83-2329 and No. 83-2823

THREE-JUDGE COURT

DEMOCRATIC PARTY OF THE
UNITED STATES, ET AL., PLAINTIFFS

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE,
ET AL., DEFENDANTS

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE,
ET AL., DEFENDANTS

AMENDED COMPLAINT FOR ENTRY OF A DECLARATORY JUDGMENT AS TO THE CONSTITUTIONALITY OF 26 U.S.C. § 9012(f)(1)

INTRODUCTION

1. This action brought by the National Democratic Party, the Democratic National Committee, and Edward M. Mezvinsky pursuant to special provisions of the Presidential Campaign Fund Act ("Fund Act"), 26 U.S.C. §§ 9001-9013, seeks a declaration upholding the constitutionality of Section 9012(f)(1) of the Fund Act, 26 U.S.C. § 9012(f)(1). This critical provision is designed to guarantee that a Presidential candidate who decides

to accept federal funding may not evade the expenditure limitations the Fund Act imposes by also simultaneously receiving massive financial support on the side from so-called "independent" political committees.

2. Under the Fund Act, the Presidential candidate of a majority party may elect to fund his campaign by accepting taxpayers' money in a sum in excess of $29,000,000. In order to obtain those funds, however, the candidate must certify (1) that he will not accept private campaign contributions to defray campaign expenses and (2) that he and his campaign organizations will not incur expenses in excess of the amount of federal funds to which he is entitled. 26 U.S.C. §§ 9002(4), 9003(b). By virtue of these provisions, Congress intended to ensure that the campaign of a candidate who has elected to receive federal funding will be financed exclusively by federal funds and not be aided by private interests.

3. Congress foresaw, however, that its objective might be circumvented by organized political committees that, although maintaining their actions are neither authorized by nor directly coordinated with the Presidential candidate, solicit contributions and make expenditures on a large scale in support of that candidate. Congress recognized that such committees for all practical purposes can become arms of a candidate's campaign, thereby undermining the Fund Act and the entire purpose behind public financing. Accordingly, Section 9012(f)(1) of the Fund Act expressly prohibits such committes from incurring expenditures of more than $1,000 to further the election of a candidate who has elected to receive federal funding.

4. The defendants have expressly and clearly stated, and demonstrated by their actions, that they expect Ronald Reagan to be the Republican Party's 1984 Presidential candidate and that Mr. Reagan will once again elect to receive federal funding to finance his campaign. The defendants have also expressly and publicly stated, and demonstrated by their actions, that they intend to

act contrary to Section 9012(f)(1) of the Fund Act by expending amounts in excess of $1,000 to further Mr. Reagan's re-election campaign. During the 1980 campaign, the defendants spent millions of dollars in support of Ronald Reagan's campaign, and they intend to spend millions again in support of Mr. Reagan in the 1984 campaign. Defendants' actions will violate 26 U.S.C. § 9012 (f)(1) and will subvert the legislated program of federal funding of Presidential elections.

PARTIES

5. Plaintiff the Democratic Party of the United States is an unincorporated membership association whose governing body is the plaintiff Democratic National Committee. The Democratic Party brings this action to vindicate the rights of its members eligible to vote for the office of President of the United States and the rights of the public. Plaintiff Democratic National Committee is the national committee, within the meaning of 26 U.S.C. § 9011 (b)(1), of the Democratic Party.

6. Plaintiff Edward M. Mezvinsky is an individual who is eligible to vote for the office of President of the United States, is a citizen and resident of Pennsylvania, and is the Chairman of the Pennsylvania Democratic State Committee. 26 U.S.C. § 9011(b)(1).

7. Defendant National Conservative Political Action Committee is a political committee within the meaning of that term as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9).

8. Defendant Fund for a Conservative Majority is a political committee within the meaning of that term as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9).

JURISDICTION AND VENUE

9. This Court has jurisdiction of the subject matter pursuant to 26 U.S.C. § 9011(b), which provides in pertinent part that "the national committee of any political party, and individuals eligible to vote for President are

authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provision of this chapter" and that "[t]he district courts of the United States shall have jurisdiction of [such] proceedings . . . and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law," and 28 U.S.C. §§ 1331 and 2201.

10. The unlawful campaign expenditures upon which this action will be made within the Eastern District of Pennsylvania with the intent to have direct and proximate effects within this District. Further, the defendants have already solicited and expended funds within the Eastern District of Pennsylvania for the purpose of re-electing Ronald Reagan.

11. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b).

THREE-JUDGE COURT

12. Pursuant to 26 U.S.C. § 9011(b)(2) and 28 U.S.C. § 2284, this action must be "heard and determined by a court of three judges," the case must be "in every way expedited," and any hearing must occur "at the earliest practicable date."

STATEMENT OF CLAIM

13. Pursuant to 26 U.S.C. §§ 9003(a) and (b), 9004 (a)(1) and 9006, the Presidential nominees of the Democratic and Republican parties will be eligible to receive public federal funding of their campaigns in the 1984 general election. It is inevitable that the candidates nominated by both the Democratic and Republican parties will elect public financing of their general election campaigns pursuant to 26 U.S.C. §§ 9005-9006.

14. Section 9012(f) of the Fund Act, entitled "Unauthorized expenditures and contributions," provides with respect to committee expenditures to support publicly financed candidates that:

> it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

26 U.S.C. § 9012(f)(1).

15. The Congress recognized that Section 9012(f) is essential to "accomplish the purpose of this bill." 117 Cong. Rec. 42,397.

16. The defendants recognize and expect that Ronald Reagan will be the Presidential candidate of the Republican Party and that he will receive federal public funding pursuant to the Fund Act. Each defendant has publicly stated that it intends knowingly and willfully to make expenditures in excess of $1,000 prior to the November 1984 election in support of Mr. Reagan's re-election campaign. Defendants are today actively soliciting, obtaining and expending funds with the avowed purpose of re-electing Ronald Reagan. Defendants have, in fact, already expended funds in excess of $1,000 to promote Mr. Reagan's re-election. These expenditures have been used, among other things, to attack specific potential candidates for the Democratic nomination for President. The amount of such funds which will ultimately be expended by defendants in support of Ronald Reagan's re-election will be in the millions of dollars. Defendant National Conservative Political Action Committee, for example, has already begun to raise and spend $5,920,000 to further the re-election of Mr. Reagan.

17. Such expenditures, to be made by these defendants to further the election of a major party Presidential candidate funded pursuant to 26 U.S.C. § 9006(b), will be expenditures "which would constitute qualified campaign expenses if incurred by an authorized committee of such candidate[], in an aggregate amount exceeding $1,000," and therefore will be in violation of 26 U.S.C. § 9012(f)(1).

WHEREFORE, plaintiffs pray that this Court:

(1) promptly convene a three-judge district court and expedite decision pursuant to 26 U.S.C. § 9011(b)(2);

(2) declare that 26 U.S.C. § 9012(f)(1) is constitutional;

(3) order such other and further relief as the court deems appropriate.

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-2329

DEMOCRATIC PARTY OF THE
UNITED STATES, ET AL., PLAINTIFFS,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE,
ET AL., DEFENDANTS,

and

FEDERAL ELECTION COMMISSION, INTERVENOR.

Civil Action No. 83-2823
Consolidated
Three-Judge Court

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE,
ET AL., DEFENDANTS.

JOINT STIPULATION OF FACT

A. *The Internal Structure of the National Conservative Political Action Committee*

1. The National Conservative Political Action Committee (NCPAC) is a nonprofit, nonmembership corporation formed under the District of Columbia Nonprofit Corporation Act on August 12, 1975. [Exhibit 1, Stipulated Findings from *Mott* v. *FEC*, pp. 9-13].

2. NCPAC is organized primarily for the purpose of directly or indirectly influencing or attempting to influence the election or defeat of candidates to federal, state, or local office. [Exhibit 1].

3. NCPAC attempts to achieve its purpose by, among other things, making contributions to candidates for public office and by engaging in independent expenditures* in support of and against candidates for public office. [Exhibit 1].

4. NCPAC registered with the FEC as a political committee on or about March 27, 1975. [Exhibit 1].

5. In order to carry out its activities, NCPAC solicits and receives contributions from the public. [Exhibit 1].

6. NCPAC conducts general solicitations for contributions to NCPAC, not related to any specific candidate, for the purpose of receiving funds to carry out its activities. [Exhibit 2, p. 12, #51].

7. NCPAC also conducts solicitations for the specific purpose of raising funds to spend on NCPAC's independent expenditure programs aimed at electing or defeating specific candidates. [Exhibit 2, p. 12, # 53].

8. NCPAC does not maintain and is not required by law to maintain separate accounts for the receipts from its general solicitations and specific solicitations. [Exhibit 1, *Mott* v. *FEC*].

9. Listed on reports filed with the FEC as original (March 27, 1975) Treasurer and Custodian of NCPAC's records was Roger J. Stone, Jr. Other officers listed were Charles R. Black, Chairman; John Carbaugh, Vice Chairman; Frank J. Donatelli, Director-at-Large; and J. David

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* The term "independent expenditure" is used throughout this stipulation for the convenience of the parties and court. By so using this term, the plaintiffs do not take a position as to whether any specific expenditure was or is independent within the meaning of the law.

Nickles, Secretary. NCPAC amended its registration with the FEC on October 10, 1975, naming Black as Chairman, Nickles as Secretary, and Stone as Treasurer and Custodian of Records. In an amendment dated March 8, 1978, John T. Dolan is listed as Chairman; J. Curtis Herge as Secretary; Becki A. Cecil [Burlingame] as Treasurer; with Stone and Donatelli having resigned. Effective April 8, 1980, Susan S. Hannegan became Treasurer of the Committee, replacing Becki Cecil Burlingame. Effective February 13, 1981, Susan Hannegan resigned as Treasurer, and Lisa Stoltenberg became Treasurer. Effective on or about July 27, 1981, Lisa Stoltenberg resigned as Treasurer, and was replaced by Candace Taw. Effective on or about February 10, 1982, Candace Taw resigned as Treasurer, and was replaced by Leif Noren, who also assumed duties as Custodian of Records on August 4, 1983. [Exhibits 2 (pp. 10-11), at 49), 3, 4 and 5].

10. NCPAC is incorporated in the District of Columbia and qualified to do business in the State of Virginia. The current principal officers of NCPAC are: John T. Dolan, Chairman; Leif Noren, Treasurer; J. Curtis Herge, Secretary; Eleanor Hannegan, Asst. Treasurer; and Cheryl Bendis, Asst. Treasurer. [Exhibit 6, NCPAC's 1982 Annual Corporate Report].

11. NCPAC's current Board of Directors consists of: John T. Dolan, Rhonda K. Stahlman and Robert L. Shartley. [*Id.*].

12. NCPAC is governed by a three member Board of Directors which is elected annually by the then current members of the board. [Exhibit 1, p. 11, at 48].

13. The decision as to which candidates to support or oppose, the manner of that support or opposition and the amounts of money to be allocated for that support or opposition are decided by NCPAC's Chairman and its Board of Directors. [*Id.*].

14. NCPAC's and FCM's direct mail fundraising solicitations typically include discussions of issues which are the subject of popular debate at the time that the solicitations are made. NCPAC's and FCM's direct mail fundraising solicitations have in the past solicited funds to assist in the independent expenditure efforts of those groups on behalf of Mr. Reagan in 1980, and have solicited funds to be expended by those groups in support of or in opposition to various legislative proposals, social and national defense issues, and to support or oppose the candidacies of various individuals for public office.

15. NCPAC's articles of incorporation and by-laws do not provide individual contributors with any voting rights or other rights or participation in the conduct of NCPAC affairs. [Exhibit 8, NCPAC's Articles of Incorporation].

16. Individual contributors to NCPAC do not determine which candidates NCPAC supports or opposes with their contributions. [*Id.*].

17. For the 1980 presidential election, the Board of Directors of NCPAC did not make decisions concerning campaign strategy or day-to-day expenditures of NCPAC. [Exhibit 10, Dolan depo., p. 12].

18. The press has reported that John T. Dolan has stated that the Board of Directors of NCPAC only does whatever is necessary to keep the organization legal by fulfilling certain nominal responsibilities set out in NCPAC's by-laws, such as holding an annual meeting. [Exhibit 11, p. 45, Statement of John T. Dolan, *The Sun*, 7/13/82; and Exhibit 10, Dolan depo., p. 12].

19. John T. Dolan is on the Board of Directors of NCPAC. [Exhibit 11, *The Sun*, 7/13/82].

20. The press has reported that NCPAC is dominated by its Chairman, John T. Dolan. [Exhibit 12, *The Wall Street Journal*, 5/29/81, Hunt article].

21. For the 1980 presidential election, John T. Dolan had primary authority to make expenditures on behalf of NCPAC. [Exhibit 13, Dolan depo., p. 11].

22. Subject to the director of the Board of Directors, there are no other restrictions on the amount or nature of expenditures that John T. Dolan is authorized to make on behalf of NCPAC. [Exhibit 10, Dolan depo., p. 12].

B. *The Internal Structure of the Fund For A Conservative Majority*

23. The Fund For A Conservative Majority (FCM) is a multi-candidate political committee registered with the Commission [Exhibit 2].

24. FCM originally registered in 1972 with the General Accounting Office as "Young America's Campaign Committee" (YACC). On October 13, 1976, in reports filed with the Commission, YACC changed its name to the "Fund for a Conservative Majority". [Exhibit 2, p. 3, # 11; Exhibit 15, FEC Committee Index; Exhibit 16, FEC Committee Index].

25. FCM is organized primarily for the purpose of directly or indirectly influencing or attempting to influence the election or defeat of candidates to federal, state, or local office.

26. FCM attempts to achieve its purpose by, among other things, making contributions to candidates for public office and by engaging in independent expenditures in support of and against candidates for public office.

27. In order to carry out its activities, FCM solicits and receives contributions from the general public.

28. FCM conducts general solicitations for contributions to FCM, not related to any specific candidate, for the purpose of receiving funds to carry out its activities.

29. FCM conducts solicitations for the specific purpose of raising funds to spend on FCM's independent expenditure programs.

30. FCM does not maintain and is not required to maintain separate accounts for the receipts from its general solicitations and specific solicitations.

31. Original FCM officers were Ronald Robinson, Chairman, and John S. Buckley, Secretary and Treasurer. On or about March 15, 1979, in reports filed with the Commission, FCM changed its officers to Robert C. Heckman, Chairman and Kenneth F. Boehm, Treasurer. Effective October 24, 1981, Kenneth Boehm resigned, and was replaced by Robert C. Heckman, who also assumed duties as Custodian of Records on January 6, 1982. [Exhibit 2, p. 3, # 11; Exhibit 82, Amended Statement of Organization, 10/24/81; Exhibit 87, Amended Statement of Organization, 1/6/82.

32. FCM is incorporated in the State of Virginia. The current principal officers of the Fund For A Conservative Majority are: Robert C. Heckman, who is both Chairman and Treasurer, and Suzanne Schotte, Secretary. [Exhibit 17, FCM's Annual Corporate Reports].

33. The current Board of Directors of FCM consists of Robert C. Heckman, Jeffrey D. Kane, Kenneth Grasso and Kenneth F. Boehm. [*Id.*].

34. Paul Dietrich was Executive Director of FCM from January, 1981, until August 3, 1983.

35. The decision as to which candidates or issues to support or oppose, the manner of that support or opposition and the amounts of money to be allocated for that support or opposition is decided by FCM's Board of Directors.

36. Robert C. Heckman has authority to oversee all facets of the operation of FCM, on a day-to-day basis, including FCM's expenditures. [Exhibit 88, Heckman depo., p. 10].

37. FCM's articles of incorporation and by-laws do not provide individual contributors with any voting rights or other rights of participation in the conduct of FCM's affairs. [Exhibit 18, FCM's Articles of Incorporation].

38. Individual contributors to FCM do not determine which candidates FCM supports or opposes with their contributions. [*Id.*].

39. For the 1980 presidential election, the Board of Directors was responsible for deciding which candidate FCM would support and for deciding the amount of support candidates received from FCM.

C. *NCPAC and FCM's Associations with Ronald Reagan, 1980 Presidential Campaign, and the Reagan Administration*

40. Soon after NCPAC came into existence in 1975, Ronald Reagan wrote a personal letter to his supporters soliciting financial support for NCPAC. The press has reported that John T. Dolan has credited Reagan with helping to establish NCPAC, saying "He [Reagan] is one of the main reasons NCPAC is here today." [Exhibit 20, *Washington Post*, 8/10/80, MacPherson article].

41. After he lost the Republican nomination for president in 1976, Ronald Reagan helped raise money by signing fundraising letters and attending a fundraising event in Washington, D.C., for NCPAC. One such solicitation letter was signed by Ronald Reagan, dated Sept. 29, 1976, and was mailed to 187,422 potential contributors to NCPAC. [Exhibit 21, p. 9 Dolan's Depo.; Exhibit 22, p. 2 Dolan's letter dated 1/28/77 from MUR 322].

42. According to John T. Dolan, Ronald Reagan was probably responsible for raising $1 million on behalf of NCPAC in 1976. [Exhibit 21, Dolan depo., p. 9].

43. The press has reported that John T. Dolan said that NCPAC's independent expenditures for commercials for the 1980 presidential race would depend on the Reagan campaign strategy. [Exhibit 20, *Washington Post*, 8/10/80, MacPherson Article].

44. John T. Dolan claimed that NCPAC's sole source of information about what the Reagan campaign was doing was through the media. [Exhibit 23, Dolan depo., p. 64].

45. The press has reported that Lyn Nofziger, former Assistant to the President for Political Affairs, and a Reagan campaign official in 1980, in describing how the head of an independent committee in 1980 could have found out how to aid the Reagan campaign in 1980, stated that "I wouldn't have to talk to Bill Casey [Reagan's 1980 campaign director]. I'd have a friend of mine talk to Bill Casey. I wouldn't have any problem getting that done. There's no way in the world that if I'm running an independent campaign I'm not going to get the information I need, or Dick Wirthlin's [a Reagan pollster] data or talk to the chairman of the Republican National Committee, or whatever." [Exhibit 24, *The New Yorker*, 12/13/82, pp. 91-92].

46. The Ronald Reagan Victory Fund was described by NCPAC as a "project" of NCPAC for the 1979-80 presidential campaign. The purpose of the Ronald Reagan Victory Fund was to elect Ronald Reagan president. This was accomplished primarily through independent expenditures. [Exhibit 2; Exhibit 26, Dolan depo. p. 41; Exhibit 27].

47. Prior to May 15, 1980, John T. Dolan, Chairman of NCPAC sent an "Urgentgram" to NCPAC supporters which indicated that "Governor Reagan's campaign is desperately short of funds going into crucial May-June primaries." This solicitation letter further indicated that NCPAC "has and will run 'independent' pro-Reagan advertisements and stated that Reagan will lose valuable momentum if he cannot maintain his campaign advertising program in high gear in the May-June primaries." [Exhibit 28, NCPAC solicitation letter].

48. In that "Urgentgram" fundraising letter, NCPAC promised to expose President Carter's weaknesses as well as promote candidate Reagan. "These advertisements will be produced by top notch professionals. . . . We will run these advertisements in major cities and places where many voters will be making up their minds between Carter and Reagan in the next two months." [*Id.*].

49. That letter also solicited funds on behalf of NCPAC's pro-Reagan independent expenditure effort. The letter requested that if the recipient could send a contribution to NCPAC, NCPAC would also ask that recipients send to Governor Reagan an enclosed postcard telling him of their support. The letter closes with the statement "Whatever you can send I know Governor Reagan would deeply appreciate it." [*Id.*].

50. The press has reported that John Block, Secretary of Agriculture, Richard Schweiker, (former) Secretary of Health and Human Services, Drew Lewis, (former) Secretary of Transportation, James Watt, Secretary of the Interior, and James Edwards, (former) Secretary of Energy, personally provided major contributors to NCPAC with "off the record" and confidential policy briefings. [Exhibit 29, *The Sun*, 9/5/82].

51. The press has reported that John T. Dolan stated that Secretary Block met with major contributors to NCPAC in his office on July 22, 1982, at the Department of Agriculture. [*Id.*].

52. The press has reported that John T. Dolan stated that Secretary Schweiker briefed major contributors to NCPAC in his office at the Department of Health and Human Services on September 14, 1982. [*Id.*].

53. The press has reported that John T. Dolan stated that Secretary Lewis briefed major contributors to NCPAC in his office at the Department of Transportation on September 14, 1982. [*Id.*].

54. The press has reported that John T. Dolan described the "off the record" and confidential policy briefings with Reagan Administration Cabinet Secretaries and White House Personnel as "one of the ways we [NCPAC] raise high dollar money." [*Id.*].

55. According to published reports, Lyn Nofziger, now working as a political consultant, will act as an outside link between Ronald Reagan's re-election campaign and conservatives, should President Reagan seek a second term. [Exhibit 30, *U.S. News & World Report*, August 29, 1983, p. 19].

56. In a *Washington Post* article entitled "GOP 'Peace Mission' Becomes Stormy," it was reported that a meeting was called to smooth relations between RNC Chairman Richard Richards and conservatives John T. Dolan, Chairman of NCPAC, Richard Viguerie, President of the Viguerie Company, Paul Weyrich, Chairman of the Committee for the Survival of a Free Congress, Howard Phillips, Chairman of the Committee for the Survival of a Free Congress, Howard Phillips, Chairman of the Conservative Caucus, Thomas F. Ellis, Chairman of the Congressional Club, Phyllis Schlafly of Eagle Forum, Ronald Godwin of Moral Majority, Robert Richardson of Gun Owners of America, and Robert C. Heckman, Chairman of the Fund for a Conservative Majority. [Exhibit 31, *Washington Post*, 5/20/81, Peterson article].

57. According to that article, the purpose of their meeting was to discuss the role of independent campaign expenditures and how such expenditures affect President Reagan. [*Id.*].

58. According to that article, the May 19, 1981, meeting was arranged by Lyn Nofziger, a former advisor to President Reagan who held the position of Assistant to the President for Political Affairs. [*Id.*].

59. In that article it was reported that Richard Richards, Chairman of the Republican National Committee,

stated that "We [the independent political groups and the Republican National Committee] will attempt to formulate an agreement as to our respective positions, including how we will disagree, if at all, in the future." [*Id.*].

60. In that article it was reported that the meeting was acrimonious and that, according to one participant, although there may have been some fiery words, nobody swung a punch. Mr. Richards is reported to have said, "My quarrel is that independent expenditure groups butt in on the strategy of the campaign. The problem is they stay too long, they say the wrong things and ultimately they may be counterproductive." [*Id.*].

61. It has been publicly reported in an article in *The Sun* entitled "Unlikely Allies: White House Staff Chief and New Right Leader," that James Baker, President Reagan's Chief of Staff, arranged in February, 1983, for major contributors to NCPAC to participate in a full day of briefings by President Reagan and his aides. [Exhibit 32, *The Sun*, 5/19/83, p. A16, Barnes article].

62. In that article it was reported that the briefing session for major NCPAC contributors, which was held in February, 1983, was requested by John T. Dolan, Chairman of NCPAC, prior to President Reagan's inauguration. [*Id.*].

63. The press has reported that NCPAC has established a $5 million project which will exclusively support the reelection effort of Ronald Reagan in 1984. [Exhibit 33, *The Sun*, 2/24/83, Barnes article; Exhibit 32, *The Sun*, 2/24/83, p. 9A].

64. This $5 million NCPAC project is called, "American Heros for Reagan." All money received by NCPAC for this project is deposited into NCPAC's general political account. [Exhibit 32].

65. The press has reported on October 3, 1983, that President Ronald Reagan liked NCPAC's television program "Ronald Reagan's America" so much that he telephoned NCPAC's Chairman, John T. Dolan, to congratulate him. Dolan thanked Reagan, then informed the President that White House lawyers didn't want them discussing what NCPAC was doing. [Exhibit 112, *Washington Post*, 10/3/83, p. A3].

66. NCPAC has distributed a letter to conservative supporters which appears on stationery bearing the letterhead of the "Re-elect Reagan Campaign Committee." [Exhibit 33, *The Sun*, 5/19/83, p. A16, Barnes article].

67. The press has reported that John T. Dolan, Chairman of NCPAC, has publicly warned President Reagan that he had better heed the "massive conservative mandate" or "pay a political price." [Exhibit 34, *L.A. Times*, 11/6/80, Shaw article].

68. The press has reported that John T. Dolan said that, "groups like ours [NCPAC and other political committees making independent expenditures] are potentially very dangerous to the political process. We could be a menace, yes. Ten independent expenditure groups, for example, could amass this great amount of money and defeat the point of accountability in politics." [Exhibit 20, *Washington Post*, 8/10/80, MacPherson article].

69. According to newspaper accounts of statements made by John T. Dolan, the rise of independent political committees such as NCPAC is "potentially very damaging to the political system." [Exhibit 35, *Washington Post*, 6/27/81, p. A4, Walsh article].

70. In the same article, it was reported that the Chairman of the Republican National Committee had asked independent political action committees to stay out of campaigns when they are asked to do so by Republican candidates or State Republican Chairmen. It was also reported that John T. Dolan said that lawyers for NCPAC and for the Republican National Committee had concluded that such an agreement to abide by the wishes of

Republican officials would violate federal election laws. [*Id.*].

71. The press has reported that John T. Dolan has publicly stated that NCPAC successfully manipulated 70% of the elections which it had targeted in 1982. In the same article Dolan claimed that David Broder said NCPAC's win record was one in seventeen. [Exhibit 36, *Washington Post*, 11/7/82, Dolan article].

72. Edward Rollins, a political advisor to President Reagan with the title of Assistant to the President for Political Affairs, has stated that he expects to work closely with NCPAC in the 1982 Congressional campaigns. [Exhibit 37, *Washington Post*, 12/31/81, Emory article].

73. The press has reported that Edward Rollins will become the political director of President Reagan's reelection campaign should Reagan choose to seek reelection. [Exhibit 30, *U.S. News & World Report*, August 29, 1983].

74. The press has reported that NCPAC and the Fund for a Conservative Majority (FCM) have publicly announced that they intend to spend at least $10 million to help re-elect President Reagan in 1984. [Exhibit 38, *Washington Post*, 5/13/83].

75. Frank Donatelli was a founder and former Director-at-Large of NCPAC (1975-79). [Exhibit 2].

76. Frank Donatelli was a member of the Board of Directors of FCM (1978-79). [Exhibit 6].

77. Frank Donatelli was the Midwest coordinator for the Reagan for President Committee in 1980. [Exhibit 87].

78. Robert Shortley, John T. Dolan's brother-in-law, has been a member of NCPAC's Board of Directors. [Exhibit 11, *The Sun*, 7/13/82; Exhibit 6, NCPAC Annual Corporate Report].

79. John T. Dolan's brother, Anthony Dolan, was a staff member for the Reagan campaign, and currently works for the Reagan Administration. [Exhibit 20, *Washington Post*, 8/10/80, MacPherson article; Exhibit 39, personnel list (campaign); and Exhibit 40, Dolan's depo., p. 49].

80. In 1980, John T. Dolan was a business partner in a joint venture with Lyn Nofziger, Paul Russo, David Keene, and Roger Stone. [Exhibit 20, *Washington Post*, 8/10/80, MacPherson article; Exhibit 41, Dolan's depo., p. 22].

81. Lyn Nofziger was an official on Ronald Reagan's presidential campaign and held the title of Assistant to the President for Political Affairs at the beginning of President Reagan's administration.

82. David Keene worked for Ronald Reagan in 1976 and was a staff member on the Bush campaign in 1980. [Exhibit 20].

83. Roger Stone, one of the founders and the original treasurer of NCPAC, was the Northeast coordinator for the Reagan campaign in 1980. [Exhibit 20].

84. The press has reported that a company owned by Richard Viguerie was a tenant in the Dolan, Nofziger, Russo, Keene and Stone partnership's Alexandria office building in 1980. [*Id.*].

85. The press has reported that NCPAC has already spent approximately $2 million on behalf of Ronald Reagan for president in 1984 and projects to spend at least $5 million. [Exhibit 132, *Washington Post*, 10/6/83].

86. Arthur J. Finkelstein and Associates has performed polling services for FCM. [Exhibit 42, Heckman's depo., p. 48].

87. Arthur J. Finkelstein has conducting polls for the Reagan for President Committee, NCPAC, and FCM. [Exhibits 39, 20, 36 and 43].

88. According to Robert Heckman, Chairman of FCM, "simply from reading the newspapers and magazines and so forth, the general analysis seemed to be that the Texas primary would be critical for Reagan." Heckman allegedly used the same authorities to also target Pennsylvania, Iowa, New Hampshire, South Carolina and Florida as important states to support the Reagan candidacy. [Exhibits 43, 90, 91, 92, 93 and 94].

89. The press has reported that Paul Dietrich, former Executive Director of FCM, who worked for the Reagan campaign in 1980, and who also headed the Republican National Committee's State Fund Operation in Missouri in 1980, has publicly stated that, "there is no way to enforce independence as long as there is a press corps giving us (FCM) information and as long as one group puts out information and gets it to others." [Exhibit 24, *The New Yorker*, December 13, 1982, p. 91].

90. The press has reported that Paul Dietrich stated that, "If I really want a poll from the Republican National Committee or a campaign, I can get it. They'll leak it to me." [*Id.*].

91. The press has reported that Paul Dietrich stated that, "All the independent PAC's . . . have a little dance [where] we dance around the law in a way that never breaks the letter but breaks the spirit of the law—but we don't agree with the law anyway." [*Id.*, p. 101].

92. FCM spent approximately $60,000 on behalf of Ronald Reagan in New Hampshire. FCM also bussed 40-50 students from New York and other locations to hand out literature in New Hampshire on behalf of Ronald Reagan. [Exhibits 116, 117].

93. According to FEC reports, Ronald Reagan exhausted nearly all of the $294,400 he was limited to by the federal election laws in connection with the New Hampshire primary. [*Id.*].

94. FCM made approximately $60,000 in expenditures on behalf of the candidacy of Ronald Reagan in New Hampshire after the Reagan campaign reached its spending limit. [*Id.*].

95. FCM sponsored activities on behalf of Mr. Reagan in connection with the New Hampshire primary also included voter mailings, newspaper advertising, and radio spots. FCM produced radio advertisements attacking Mr. Reagan's opponent George Bush. [*Id.*; Exhibit 45, letter from William Loeb].

96. The press has reported that FCM publicly took credit for Ronald Reagan's victory in New Hampshire. [Exhibit 24, *The New Yorker*, December 13, 1982, p. 91].

97. Prior to the May 6, 1980, primary in Texas, Ronald Reagan had utilized most of the $14.7 million limit under the Primary Matching Account Act. FCM then expended approximately $80,000 on behalf of Ronald Reagan in connection with the Texas primary. With this $80,000 FCM bought radio advertisements and financed a 250,000 piece mailing campaign. [Exhibits 24, 89].

98. FCM set aside $100,000 for use in support of Ronald Reagan for the California primary, but decided to save that amount for use on behalf of Mr. Reagan in the general election, as reports and communications in the press indicated that the Reagan campaign did not require assistance in that state. [Exhibit 24].

99. FCM also budgeted for expenditures in connection with the Reagan 1980 candidacy in primaries held in Florida, Illinois, Connecticut, Pennsylvania, Ohio and New Jersey and in state conventions in Virginia and Missouri. These budgeted expenditures included radio and newspaper advertising, voter mailings, polling and literature distribution. [Exhibits 24, 46, 91, and 94].

100. FCM sent other solicitation letters in connection with its "Citizens for Reagan in '80" project in envelopes which read, "Dateline: Republican Convention, Detroit

11:30 p.m. Weds. July 16, 1980" which solicited funds for "national advertising on television and radio, full page advertisements in newspapers, election mailings pinpointed to selected voters . . . which will be carefully and professionally used to help elect Ronald Reagan president." [Exhibit 2, p. 5, # 21; Exhibit 47].

101. This solicitation letter indicated FCM believed it needed to raise at least $3,676,000 on behalf of Ronald Reagan for the general election and expressed its immediate need to raise $755,000 over the following three weeks to reserve advertising space and television and radio time for the fall. [Exhibits 24, 47].

102. FCM's direct mail campaigns are in whole or in part computerized. The employees, consultants and agents of FCM include professional speechwriters, public relations and advertising specialists, media experts and firms which maintain and rent professionally compiled mailing lists. [Exhibit 2, p. 5, # 24; Exhibit 48].

103. FCM had posters bearing the name of its project, "Citizens for Reagan in '80" at the Republican National Convention for use in connection with floor demonstrations and rallies during the convention. [Exhibit 2, p. 5, # 23].

D. *Other Independent Expenditure Campaigns for Reagan for President*

104. The National Congressional Club (NCC), formerly known as North Carolina Congressional Club (NCCC), a political committee registered with the FEC, undertook activities on behalf of the nomination and election of Ronald Reagan, in the 1980 election cycle which were similar in nature to those undertaken by NCPAC and FCM. [Exhibits 50, 116, 119].

105. NCC is a political committee that originally registered with the Clerk of the U.S. House of Representatives on October 29, 1974. [Exhibit 50].

106. NCC has as its Honorary Chairman, Senator Jesse Helms. NCC had a "project" entitled "Americans for Reagan" which was organized for the purpose of raising and expending money on behalf of the candidacy of Ronald Reagan for president in 1980. Jesse Helms is also the Honorary Chairman of "Americans for Reagan." [*Id.*, p. 9, # 43; Exhibit 49, NCC solicitation, p. 2].

107. The purpose of Americans for Reagan was to help elect Ronald Reagan president. This was accomplished through independent expenditures. [Exhibit 49].

108. During the last week of May, 1980, "Americans for Reagan" sent out its initial mailing of 250,000 letters soliciting funds to purchase television time on behalf of the Reagan candidacy for the nomination as the Republican Party candidate for president. The letter solicited funds to "Americans for Reagan" in order to amass $26,800 in the following 30 days for the purchase of air time for television advertisements, was written by Jesse Helms and sent on Senator Helms' personal stationery. The letter stated "Americans for Reagan" 's first goal as being to purchase over $500,000 of television time for the fall on behalf of Ronald Reagan's campaign for the general election. Checks were to be made payable to "Americans for Reagan." [Exhibit 2, p. 9, # 44; Exhibit 49, pp. 1-2].

109. Another solicitation letter on behalf of NCC's project "Americans for Reagan," dated July 14, 1980, was written by Senator Helms from the Republican National Convention. This letter solicited funds for the purchase of television spots, newspaper advertisements, and radio commercials which were already prepared for "Americans for Reagan." The letter further indicated that "Americans for Reagan" would also be ordering brochures and other campaign materials. The solicitation letter asked recipients to "Remember, Ronald Reagan and our nation need your financial help." [Exhibit 2, p. 10, # 45; Exhibit 51, pp. 1-3].

110. "Americans for Reagan" was specifically organized to solicit funds from the general public on behalf of the candidacy of Ronald Reagan "because the Reagan campaign cannot accept your contribution." [Exhibit 2, p. 10, # 46; Exhibit 51].

111. The press has reported that Arthur J. Finkelstein and Associates performed polling services for NCC during the 1980 presidential election. [Exhibit 24, *The New Yorker*, December 13, 1982, p. 92].

112. The press has reported that Senators Jesse Helms and Harrison Schmitt, Chairman for Americans for Change (AFC) (another registered political committee similar in nature to NCPAC, FCM and NCC), were delegates who supported Ronald Reagan at the July, 1980, Republican National Convention. [Exhibit 20, *Washington Post*, August 10, 1980, MacPherson article].

113. Americans For Change (AFC) is an unincorporated association which registered with the Federal Election Commission as a multi-candidate political committee by filing a Statement of Organization on May 23, 1980. Its officers were listed as Harrison H. Schmitt, Chairman; Carl T. Curtis, Treasurer; and Stan Huckaby, Assistant Treasurer, who is also the custodian of the committee's records. AFC did not file with the Commission as an "authorized committee" of Ronald Reagan or George Bush or any other presidential or vice presidential candidates for the 1980 election. Nor has it filed with the Commission as an "authorized committee" of Ronald Reagan, or for any other presidential or vice presidential candidates for the 1984 election. [Exhibit 128].

114. AFC held a press conference at the Republican National Convention as was listed on the official Calendar of Events for the 1980 Republican National Convention. Appearing on behalf of AFC at that press conference were Senator Harrison Schmitt, Chairman of AFC, John Harmer, former Lt. Governor of California and co-

chairman of AFC, appointed by Mr. Reagan in 1974, and Howard Ruff. [Exhibit 129].

115. On July 18, 1980, Americans for Change, as advertised by letter from AFC Chairman, Senator Harrison Schmitt, held the first fundraiser on behalf of Ronald Reagan subsequent to the Republican National Convention. Tickets to the fundraiser held in Houston, Texas, cost $1,000 per couple and were payable to "Reagan for President in '80". [Exhibit 2, p. 3, # 10].

116. Harrison Schmitt, the Chairman of AFC, was, at the same time, a member of the Republican National Committee Advisory Council on Economic Affairs and a Reagan delegate to the 1980 Republican National Convention. [Exhibit 135].

117. John Harmer, the Co-Chairman of AFC, was Ronald Reagan's former Lieutenant Governor. [Exhibits 117, 122, 129].

118. Stan Huckaby, the Assistant Treasurer and Custodian of Records of AFC, was, at the same time, the Treasurer of the 1980 Republican Presidential Unity Committee, an authorized committee of Ronald Reagan, and has served as a paid consultant to the Republican National Committee. [Exhibits 128 and 138].

119. He maintained his office at the Republican National Committee headquarters. [*Id.*].

120. James Edwards, former Governor of South Carolina and a member of the AFC steering committee, was, at the same time, a member of the Republican National Committee Advisory Council and a Reagan delegate to the 1980 Republican National Convention. [Exhibits 120, 121, 135 and 137].

121. Anna Chennault, a member of the AFC steering committee, was, at the same time, a member of the Republican National Committee Advisory Committee on Fiscal Affairs, and an ex-officio member of the Republi-

can National Committee Executive Committee. [Exhibits 120, 121, 135].

122. After the 1980 election, AFC invited contributors and their families to attend various events sponsored by AFC in conjunction with the Inauguration of President-elect Reagan. The invitation was signed by then-Senator Harrison Schmitt and stated that the purpose of these events was to provide AFC supporters "an opportunity to meet the Republican men and women who will play an important part in shaping the destiny of our country." The invitation also stated:

> We intend to hold attendance at each of our functions to a limited number of guests to allow everyone ample opportunity to visit with Senators or Cabinet officials who may be in attendance.

[Exhibit 119].

123. James Edwards, a member of the steering committee of AFC, was appointed Secretary of Energy by President Reagan. [Exhibits 135, 137].

124. Senator Jesse Helms (R., N.C.), Honorary Chairman of the National Congressional Club, has stated that "I've had to . . . talk indirectly with [Senator] Paul Laxalt (R., Nev.) [President Reagan's national campaign chairman]" to avoid a direct consultation with then-candidate Reagan. [Exhibit 24, *The New Yorker*, December 13, 1982, pp. 90-91; Exhibit 20, p. 28].

125. Senator Helms has also stated that "I hope that the Senator [Laxalt] would pass along [the messages], and I think the messages have gotten through all right." [Exhibit 20, p. 28].

126. Independent expenditures by PACs, individuals and other groups exceeded $16 million for the 1979-80 election cycle. A total of $13.7 million was spent to influence the presidential race. [Exhibit 57, FEC Index of Independent Expenditures, 1979-1980; Exhibit 115].

127. Americans For An Effective Presidency (AEP) is an unincorporated association which registered with the Commission as a multi-candidate committee by filing a Statement of Organization. AEP was formed for the express purpose of electing Ronald Reagan president. The only officer listed on its statement was its Treasurer, Robert H. Masson. Serving as AEP's Chairman is Peter Flanigan and as Chairman of the Expenditures Committee, Thomas Reed. [Exhibits 130, 131].

128. It has been reported in the press that Peter Flanigan, the Chairman of AEP, was, at the same time, a member of the Policy Board of the Republican National Committee Advisory Council on Economic Affairs. [Exhibits 133 and 135].

129. Stuart Spencer, who was involved in the organization of AEP and who was to run its operation, subsequently worked for the official Reagan campaign. He ran Mr. Reagan's campaigns for Governor of California in 1966 and 1970 and was the national political director for the official 1976 general election campaign for the Republican Party candidate. [Exhibits 123, 124, 125 and 126].

130. William Clements, who was involved in the organization of AEP, served as the Chairman of the official Reagan campaign in Texas and is a member of the Republican National Committee Advisory Council on National Security and International Affairs. [Exhibits 19, 135, 136].

131. Bailey, Deardourff & Associates, the Media Directors of AEP, served as the advertising agency for the official 1976 general election campaign for the Republican Party candidate. [Exhibit 131].

132. Douglas L. Bailey, a prominent media consultant and a Media Director for AEP during the 1980 Presidential campaign, has expressly acknowledged the power and influence wielded by large private fundraisers.

> The people who wield the authority coming out of private fundraising are not the people who give the money so much as the people who raise the money, and that has not significantly changed. If anything, it may have been accelerated [by the $1,000 limit on contributions] because the guy who can raise $51,000 in contributions is the guy who is incredibly important to that campaign and therefore has a significant amount of power.

[Exhibit 131 and Deposition of Douglas L. Bailey, p. 28, in *RNC v. FEC*, 487 F. Supp. 280 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980)].

133. AEP had a stated objective in 1980, which was to raise and expend funds to defeat the re-election of Jimmy Carter, to elect Ronald Reagan president, and to further Governor Reagan's prospects for victory should the presidential election have to be decided in the U.S. House of Representatives. [Exhibit 131].

134. AEP considered every contributor to be a member of that organization. [*Id.*].

135. An Expenditures Committee determined which expenditures were to be made by AEP, it hired all staff, provided legal counsel, supervised all recordkeeping, authorized all fundraising and represented the organization to the media and public. [*Id.*].

136. Professional staff was retained by AEP to implement all aspects of AEP's programs. [*Id.*].

137. AEP hired as staff director, Don Pierce, the 1976 regional political director for former President Ford who has also managed numerous Congressional campaigns. [*Id.*].

138. AEP devoted at least 75% of all its funds to telephone, radio, and newspaper advertising to defeat Jimmy Carter and elect Ronald Reagan. The timing and location of such advertising was determined by the Expenditure

Committee after having received input from "Participating Members" of AEP and AEP's professional staff. [*Id.*].

139. AEP ran a complete press office that sought free radio and television time and newspaper space by making prominent Republicans available for interviews as part of its strategy for achieving the election of Mr. Reagan and Mr. Bush in 1980. [*Id.*].

E. *Independent Expenditures and Other Political Activity*

140. The press has reported that, to counter NCPAC's efforts in support of and in opposition to certain candidates, at least five new political action committees were created. Those committees, the press has reported, were not formally connected with the Democratic Party, but like the National Committee for an Effective Congress, which spent more than $1,420,000 in 1979-80, the committees ranged from general to exclusive support of Democratic candidates. [Exhibit 14].

141. During 1975-76, NCPAC's reports filed with the FEC indicate receipts of $3,006,292.09 and disbursements of $2,954,147.83. Of this latter amount NCPAC reported spending:

a. $2,123,568.20 for operating expenses.*

b. $88,537.68 for independent expenditures.

c. $400,180.16 for direct/in-kind contributions to federal candidates.

[Exhibit 53, 1975 year end amendment; Exhibit 54, 1976 year end amendment].

142. During 1979-80, NCPAC's reports filed with the FEC indicate receipts of $7,648,551.34 and disbursements

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* Operating expenditures include, but are not limited to, salaries, fundraising, travel and administrative costs and other non-allocable costs.

of $7,530,378.09. Of this latter amount NCPAC reported spending:

a. $3,813,929.29 for operating expenses.*

b. $3,402,616.81 for independent expenditures.

c. $253,326.99 for direct/in-kind contributions to federal candidates.

[Exhibit 55, 1979 year end amendment; Exhibit 56, 1980 year end amendment, Exhibit 53, FEC 1979-80 D Index].

143. During the 1979-80 presidential race, NCPAC spent $1,859,168 as independent expenditures advocating the election of Ronald Reagan for president. NCPAC spent an additional $108,077 against Jimmy Carter for president. [Exhibit 57, *FEC Index of Independent Expenditures, 1979-1980*, p. 31].

144. During 1983 (7/83), NCPAC reported to the FEC, receipts of $3,015,930.44 and disbursements of $2,998,504.54. Of this latter amount, NCPAC reported spending:

a. $2,711,558.52 for operating expenses.*

b. $83,575.84 for independent expenditures.

c. $6,646.43 for direct/in-kind contributions to federal candidates.

[Exhibit 58, 1983 August Monthly Report].

145. The press has reported that John T. Dolan stated that independent expenditures made by political committees, including NCPAC, made the difference in Louisiana and Mississippi during the 1980 presidential election. [Exhibit 59, *Miami Herald*, 3/29/81].

146. According to FEC Records, NCPAC had received $8,772,146 in contributions and made $9,003,776 in expenditures by October 13, 1982. [Exhibits 113, 114, NCPAC 1981 Year End and 1982 Pre-General Reports].

* Operating expenditures include, but are not limited to, salaries, fundraising, travel and administrative costs and other non-allocable costs.

147. Of the $9,003,776 in expenditures which NCPAC made for the 1981-82 election by October 13, 1982, $5,760,320, went to fundraising, salary, travel and administrative costs. [*Id.*].

148. In 1978, NCPAC received 122 contributions between $500 and $1,000, 5 contributions between $1,001 and $2,500, and 5 contributions between $2,501 and $5,000. [FEC Data Base].

149. In 1980, NCPAC received 763 contributions between $500 and $1,000, 93 contributions between $1,001 and $2,500, and 54 contributions between $2,501 and $5,000. [*Id.*].

150. In 1982, NCPAC received 908 contributions between $500 and $1,000, 178 contributions between $1,001 and $2,500, and 114 contributions between $2,501 and $5,000. [*Id.*].

151. In 1983, NCPAC has received 264 contributions between $500 and $1,000, 48 contributions between $1,001 and $2,500, and 85 between $2,501 and $5,000. [*Id.*].

152. From 1978 to the present, NCPAC has received 2,057 contributions between $500 and $1,000, 324 contributions between $1,001 and $2,500, and 258 contributions between $2,501 and $5,000. [*Id.*].

153. During 1975-76, FCM's reports filed with the FEC, indicate receipts of $474,642.09 and disbursements of $484,344.70. Of this latter amount, FCM reported spending:

a. $391,095.60 for operating expenses.*

b. $39,655.26 for independent expenditures.

* Operating expenditures include, but are not limited to, salaries, fundraising, travel and administrative costs and other non-allocable costs.

c. $50,943.84 for direct/in-kind contributions to federal candidates.

[Exhibit 61, 1975 year end amendment; Exhibit 62, 1976 comprehensive amendment; and Exhibit 63, conciliation agreement, MUR 503].

154. During 1979-80, FCM's reports filed with the FEC indicate receipts of $3,163,537.68 and disbursements of $3,150,292.79. Of this latter amount, FCM reported spending:

a. $937,192.93 for operating expenses.*

b. $2,062,908.29 for independent expenditures.

c. $143,082.00 for direct/in-kind contributions to federal candidates.

[Exhibit 64, 1979 year end amendment; Exhibit 65, 1980 year end amendment; Exhibit 84, FEC 1979-80 D Index].

155. During 1979-80, 100% of FCM's independent expenditures were made to aid Ronald Reagan in his race for president [Exhibit 66, FEC Index of Independent Expenditures, 1979-80, p. 168].

156. FCM spent more than $500,000 during the 1980 primaries in connection with its "project" entitled "Citizens for Reagan in '80". [Exhibit 2, p. 3, # 15].

157. The purpose of Citizens for Reagan in '80 was to elect Ronald Reagan president. This was accomplished primarily through independent expenditures.

158. Many of FCM's expenditures on behalf of Ronald Reagan for the 1980 primaries were made to purchase advertisements which attacked Ronald Reagan's chief rival, George Bush. [Exhibit 2, p. 3, # 13].

159. From January through June of 1980, FCM reported making expenditures on behalf of Ronald Reagan totaling $656,467.26. Included in this amount, FCM reported spending: $465,727.22 on written communications; $29,200.80 on radio ads; $27,054.69 on newspaper ads; $61,080.39 on the rental of mailing lists; $3,163.75 on computer services; $3,143.87 on bumper stickers; $4,405.00 on consulting services; $7,822.86 on television ads; $2,172.00 for buttons; $21,675.00 for surveys; $9,991.92 on promotional paraphernalia; $1,475.00 on video. [Exhibit 2, p. 6, # 25; Exhibit 67; Exhibit 48].

* Operating expenditures include, but are not limited to, salaries, fundraising, travel and administrative costs and other non-allowable costs.

160. During 1983 (6/83), FCM reported to the FEC, receipts of $822,229.23 and disbursements of $818,968.69. Of this latter amount, FCM reported spending:

a. $725,824.12 for operating expenses.*

b. $55,448.37 for independent expenditures.

c. $18,355.31 for direct/in-kind contributions to federal candidates.

[Exhibit 85, FCM's July Monthly Report].

161. The 1980 presidential general election campaigns of Ronald Reagan and Jimmy Carter were publicly financed. The Reagan and Carter Committees received $29.4 million from the United States Treasury. [26 U.S. § 9001, *et seq.*].

162. Over $13.7 million was spent as independent expenditures to influence the 1980 presidential race by political committees, individuals, and other groups. [Exhibits 57 and 115].

163. Over $12.2 million was spent as independent expenditures by political committees, individuals, and other groups, on behalf of Ronald Reagan for president during the 1980 election cycle. [*Id.*].

164. In addition to the $12.2 million spent on behalf of Ronald Reagan, an additional $747,000 was spent against Reagan's 1980 presidential opponents. [*Id.*].

* Operating expenditures include, but are not limited to, salaries, fundraising, travel and administrative costs and other non-allowable costs.

165. As of July 1, 1983, there were 3,461 political committees eligible to make independent expenditures for the 1984 presidential election. [FEC Data Base].

166. For the 1979-80 election cycle the following political committees reported spending the most money on independent expenditures:

1. Congressional Club	$4,601,949
2. NCPAC	3,397,962
3. Fund for a Conservative Majority	2,062,456
4. Americans for an Effective Presidency	1,270,598
5. Americans for Change	711,856
6. NRA Political Victory Fund	441,801
7. Christian Voice Moral Government Fund	406,199
8. 1980 Republican Presidential Campaign Committee	314,749
9. American Medical Political Action Committee	172,597
10. Gun Owners of America Campaign Committee	119,891

[Exhibits 57 and 115].

167. For the 1979-80 election cycle the following individuals reported spending the most money on independent expenditures:

1. Cecil B. Haden	$559,333
2. Stewart Rawlings Mott	119,179
3. Norman Lear	108,501
4. Richard M. Devos	70,575
5. Fay Van Andel	68,433
6. Theo N. Law	66,250
7. David B. Melville	35,159
8. Henry C. Grover	29,976
9. Michael Rosen	25,949
10. Dwight G. Vorhes	25,000

[Exhibits 57 and 116].

168. In 1978, FCM received 22 contributions between $500 and $1,000, 2 contributions between $1,001 and $2,500, and 1 contribution between $2,501 and $5,000. [FEC Records].

169. In 1980, FCM received 265 contributions between $500 and $1,000, 15 contributions between $1,001 and $2,500, and 9 contributions between $2,501 and $5,000. [*Id.*].

170. In 1982, FCM received 157 contributions between $500 and $1,000, 13 contributions between $1,001 and $2,500, and 7 contributions between $2,501 and $5,000. [*Id.*].

171. In 1983, FCM has received 27 contributions between $500 and $1,000, and 61 contributions between $1,001 and $2,500. [*Id.*].

172. From 1978 to the present, FCM has received 471 contributions between $500 and $1,000, 91 contributions between $1,001 and $2,500, and 17 contributions between $2,501 and $5,000. [*Id.*].

173. Independent expenditures by PACs, individuals and other groups exceeded $2 million for the 1975-76 election cycle (figures are approximated and unverified). A total of $1.6 million was spent to influence the presidential race. [Exhibit 68, FEC Press Release, 10/9/80].

174. For the 1979-1980 election cycle, 51 individuals spent over $1,000 to influence the 1980 presidential election. [Exhibit 134, Affidavit].

175. These 51 individuals spent over $1.7 million to influence the 1980 presidential election. [Exhibit 134, Affidavit].

F. *Common Vendors*

176. The Reagan for President Committee and the Reagan/Bush Committee as well as NCPAC and FCM

employed many of the same vendors. The Reagan for President Committee employed these vendors to assist in the 1980 presidential campaign while NCPAC and FCM used many of the same vendors while making independent expenditures on behalf of Ronald Reagan for president during the 1980 election.

177. Ed Nichols Associates, a direct mail firm, was performing services as early as August, 1979, through July, 1980, for the Reagan for President Committee, in September, 1980, for the Reagan/Bush Committee, and as early as November, 1980, for NCPAC. [Exhibits 73, 101 and 102].

178. Arthur J. Finkelstein was on the Board of Directors of NCPAC in 1979. [Exhibit 6, NCPAC's Annual Report].

179. Arthur J. Finkelstein was the chief political pollster for NCPAC during the presidential election of 1980 and continued in that capacity through 1981. [Exhibit 37, Washington Post, 12/31/81, Emory article; Exhibit 78, Dolan's depo. p. 94].

180. Arthur J. Finkelstein and Associates, a political consulting firm owned by Arthur J. Finkelstein, performed services for the Reagan for President Committee as early as September, 1979, through February, 1980. This firm first provided political services to NCPAC as early as April, 1978. [Exhibits 78, 79 and 111].

181. Arthur J. Finkelstein and Associates conducted political polls for NCPAC, FCM, and the Reagan for President Committee and the Reagan/Bush Committee during 1979-80. [Exhibits 52, 110 and 111].

182. The press has reported that Arthur J. Finkelstein and his firm, Arthur J. Finkelstein and Associates, received payments from NCPAC of $261,333 between 1975 and January, 1982. [Exhibit 11, The Sun, 7/13/83].

183. DELETED.

184. The press has reported that Richard Geske is a direct mail specialist. [Exhibit 11, *The Sun*, 7/1/82, p. 45].

185. The press has reported that Richard Geske and the National Conservative Political Action Committee—State Election Fund, a NCPAC affiliate, were joint owners of Mediamerica, Inc. during the period of 1978-79. [*Id.*].

186. The press has reported that Richard Geske bought NCPAC State Election Fund's share in Mediamerica, Inc., during 1979. [*Id.*].

187. Richard Geske's firm Mediamerica, Inc., received payments from NCPAC totalling $1.3 million between 1975 and January, 1982. This figure represents approximately 12% of NCPAC's total operating funds for three years. [Exhibit 11, *Sun*, 7/13/82; Exhibit 80, Dolan's depo., p. 88].

188. Mediamerica, Inc., a media production and advertising firm, provided services to the Reagan for President Committee as early as January, 1980 through October, 1980, and for NCPAC as early as April, 1980 through November, 1980. [Exhibits 80, 108 and 110].

189. The press has reported that Rhonda Stahlman was director of NCPAC's lobbying arm, Conservatives Against Liberal Legislation (CALL). She held this position from 1978 to 1982. [Exhibit 11, *The Sun*, 7/13/82, p. 45].

190. Rhonda Stahlman was a member of Mediamerica's Board of Directors from 1979 through 1982. [*Id.*].

191. Rhonda Stahlman was a member of both NCPAC's Board of Directors and Executive Committee from 1979 to 1983. [Exhibit 7, NCPAC's Annual Reports; Exhibit 10, Dolan depo., p. 13].

192. John T. Dolan, Rhonda Stahlman, and Dolan's sister, Maiselle Shortley, all acted as unpaid members of

Mediamerica's Board of Directors. [Exhibit 11, *The Sun*, 7/13/82].

193. John T. Dolan was a member of the Mediamerica's Board of Directors from 1978-79. [*Id.*].

194. Maiselle Shortley, John T. Dolan's sister, was Vice President and a member of the Board of Directors of Mediamerica, Inc., from the company's inception in 1978 through 1982. [Exhibit 81, Mediamerica's Annual Report].

G. *Additional Facts*

195. According to FCM, the Committee received the following contributions during the following years:

Year	Number of Contributions	Total Dollar Amount
1983 (to date)	38,549	$1,057,176.00
1982	82,107	1,707,347.00
1981	49,000	949,705.00
1980	100,353	2,526,824.00
1979	8,619	168,493.00
1978	14,862	298,058.00

196. Exhibit 139 sets forth the costs of placing ads in various forms of media. The information contained in this exhibit is incorporated herein by reference.

197. Exhibit 140 is a videotape of a commercial entitled "Ronald Reagan's America" which was produced and financed by NCPAC and which has been and will be used during the 1984 presidential cycle.

198. On July 24, 1979, then-candidate Ronald Reagan sent to FCM a mailgram requesting that FCM immediately stop its independent effort. [Exhibit 141].

199. Twenty-five labor unions and five incorporated membership organizations reported spending a total of $2.2 million on partisan communications directed to their members during the 1981-82 election cycle. [Exhibit 142, FEC newsletter, Vol. 9, #10, October 1983].

200. The Internal Revenue Service has reported that in 1977, only 29% of those taxpayers who filed income tax returns chose to have $1.00 of their taxes earmarked for the Presidential Election Campaign Fund Act. In 1981, the last year for which figures are available, 48.2% of returns were marked "no" and 26.1% were marked "yes" to the questions whether $1.00 of a taxpayer's tax liability should go to the Fund. [Exhibit 143, "Campaign Practices Reports," *Congressional Quarterly*, Vol. 10, #7, 4/11/83].

201. Although only a minority of taxpayers check the "yes" presidential campaign box, the election fund is in no financial difficulty. The presidential fund had a total of $153.4 million at the end of 1982. [*Id.*].

202. During the 1979 election cycle, NCPAC received contributions from approximately 101,000 contributors. During the 1981-82 election cycle, NCPAC received contributions from approximately 143,000 contributors. [Review of NCPAC's contributor data base].

Respectfully submitted,

/s/ Robert R. Sparks
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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-2329
No. 83-2823

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.
v.
NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.

COMMONWEALTH OF PENNSYLVANIA)
) ss.
COUNTY OF MONTGOMERY)

AFFIDAVIT

Sheldon Scharfberg being duly sworn according to law deposes and says that he is President of Scharfberg & Associates, Ltd., Advertising, an advertising agency located at 518 Benjamin Fox Pavillion, Jenkintown, Pennsylvania, and that the following facts are true and correct and are based upon his personal knowledge, including his knowledge of the prices and charges quoted by various media entities within the past six months:

Radio

1. KYW Radio in Philadelphia, Pennsylvania is the highest rated and most listened to radio station in Philadelphia.

2. The two peak listening times for KYW Radio are the "morning drive" period, 6:00-10:00 a.m. Monday through Friday, and the "evening drive" period, 4:00-8:00 p.m. Monday through Friday.

3. An individual who wished to purchase one sixty second spot on KYW on Radio during the "morning drive" period would have to pay approximately $400 for those sixty seconds.

4. An individual who wished to purchase one sixty second spot on KYW Radio during the "evening drive" period would have to pay approximately $200 for those sixty seconds.

5. The average cost for a sixty second spot on radio stations in Philadelphia, Pennsylvania is approximately $125.

6. The average cost for a sixty second spot on radio stations in Trenton, New Jersey is approximately $25.

7. The average cost for a sixty second spot on radio stations in Harrisburg, Pennsylvania is $70.

8. The average cost for a sixty second spot on radio stations in the Scranton-Wilkes-Barre, Pennsylvania area is approximately $15 to $20.

9. The average cost for a sixty second spot on radio stations in the Binghamton-Elmira, New York area is approximately $20.

10. The average cost for a sixty second spot on radio stations in the Reading, Pennsylvania area is approximately $25 to $30.

11. The average cost for a sixty second spot on radio stations in Atlantic City, New Jersey is approximately $25 to $30.

Television

12. The average cost for a thirty second spot on the two UHF stations in Philadelphia, Pennsylvania, Channels 17 and 29, during prime-time, 8:00 to 10:00 p.m. Monday through Friday, is approximately $350 to $400.

13. The average cost for a thirty-second spot on UHF stations in Philadelphia, Pennsylvania, Channels 17 and 29, after 1:00 a.m. is approximately $50.

14. The average cost for a thirty second spot on UHF stations in Philadelphia, Pennsylvania is $150-$200.

15. The average cost for a thirty-second spot on one of the VHF network affiliated stations, CBS, ABC and NBC, in Philadelphia, during prime time, 8:00-11:00 p.m., is approximately $4,000.

16. The average cost for a thirty-second spot on one of the VHF network stations in Philadelphia after 1:00 a.m. is approximately $125.

17. The average cost for a thirty-second spot on the NBC affiliate in Philadelphia, Channel 3, during NBC's Today Show, 7:00-9:00 a.m. Monday through Friday, is approximately $450.

18. The average cost for sixty second spots on television is approximately two times the cost of thirty second spots.

Newspapers

19. The Philadelphia Inquirer charges approximately $9.74 per agate line of advertising as its daily rate. This is the most expensive rate in the Philadelphia area. An agate line is a space in a newspaper one column wide and 1/14 inch deep. The Philadelphia Inquirer is six columns wide. The Philadelphia Inquirer is approximately 21.5 inches deep. Thus, a full page advertisement in the Inquirer costs approximately $17,532.

20. However, an individual may purchase far less than a full page ad. For example, the advertisement attached hereto as Exhibit A, which is two columns wide and 5½ inches deep would cost approximately $1,432 to place in the Inquirer. The advertisement attached hereto as Exhibit B, which is two columns wide and two inches deep, would cost approximately $545 to place in the Inquirer.

21. The Philadelphia Daily News, the afternoon paper that circulates throughout Philadelphia, charges only a little more than half of what the Inquirer charges for advertising. The Daily News charges $5.18 per agate line as compared to the $9.74 charged by the Inquirer. A full page ad in the tabloid size Daily News is approximately $5,180. The ad attached as Exhibit A hereto

which would cost $1,432 to place in the Inquirer would cost only $761 to place in the Daily News. The ad attached as Exhibit B hereto would cost approximately $290 to place in the Daily News as compared to $545 in the Inquirer.

22. The Easton Star-Democrat in Easton, Pennsylvania charges $.41 per agate line, less than 5% of the Inquirer rate. Thus, the ad attached hereto as Exhibit A would cost only about $60 in the Star-Democrat. The ad attached hereto as Exhibit B would cost only about $23 in the Star-Democrat.

23. The Binghamton Press in Binghamton, New York charges $1.17 per agate line. Thus, the ad attached as Exhibit A would cost approximately $172 and the ad attached as Exhibit B would cost approximately $66 in the Press.

24. The Camden Courier Post in Camden, New Jersey charges $2.02 per agate line. The ad attached as Exhibit A would cost approximateiy $290 and the ad attached as Exhibit B would cost approximately $113 to place in the Courier-Post.

25. The Scranton Times in Scranton, Pennsylvania charges $1.02 per agate line. The ad attached as Exhibit A would cost approximately $146 and the ad attached as Exhibit B approximately $57 in the Times.

26. The Harrisburg Patriot News in Harrisburg, Pennsylvania charges $.99 per agate line. The ad attached as Exhibit A would cost approximately $142 and the ad attached as Exhibit B approximately $55 in the Patriot News.

27. The Lancaster Journal in Lancaster, Pennsylvania charges $.74 per agate line. The ad attached as Exhibit A would cost approximately $106 and the ad attached as Exhibit B approximately $41 in the Journal.

28. The Atlantic City Press in Atlantic City, New Jersey charges $1.03 per agate line. The ad attached as Exhibit A would cost approximately $148 and the ad attached as Exhibit B approximately $58 in the Press.

29. The Hazelton Standard Speaker in Hazelton, Pennsylvania charges $.45 per agate line. The ad attached as Exhibit A would cost approximately $65 and the ad attached as Exhibit B approximately $25 in the Standard Speaker.

/s/ Sheldon Scharfberg
SHELDON SCHARFBERG

Sworn to and subscribed before me this 12th day of October, 1983.

/s/ Nita Godmilow
NITA GODMILOW

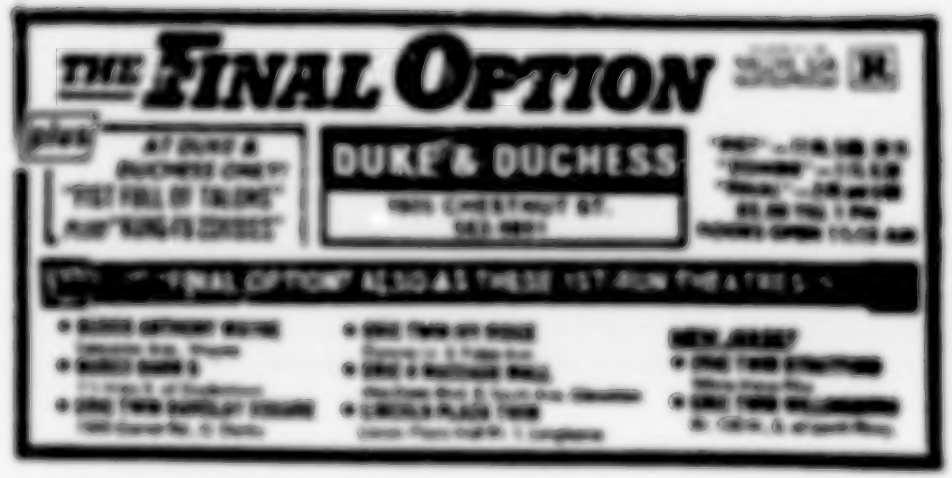
Notary Public, Phila., Phila. Co.

My Commission expires Sept. 17, 1987

EXHIBIT A

BEST AVAILABLE COPY

EXHIBIT B



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 80-1609 and 1754
(Consolidated)

Three-Judge Court

COMMON CAUSE, ET AL., PLAINTIFFS,

v.

HARRISON SCHMITT, ET AL., DEFENDANTS,

and

FEDERAL ELECTION COMMISSION, INTERVENOR,

FEDERAL ELECTION COMMISSION, PLAINTIFF,

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS.

AFFIDAVIT

COMMONWEALTH OF VIRGINIA)
) ss:
CITY OF ALEXANDRIA)

1. I am Thomas N. Edmonds, President of Edmonds Associates, Inc.

2. Edmonds Associates, Inc. is an advertising agency engaged in the business of, among other things, purchasing for clients advertising space in newspapers and magazines and purchasing broadcast time in the radio and television media. In that capacity, Edmonds Associates subscribes to a periodical directory, known as the Standard Rate and Data Service, which is updated monthly, and which contains general advertising rates in the print and broadcast media. As updated through September

1983, that directory shows that advertising rates for 60 seconds on news and information stations during "drive" time or prime time broadcast periods in major metropolitan areas is as follows:

STATION	AREA	RATE
KNX	Los Angeles	$500.00
WCBS	New York	$600.00

In addition, Edmonds Associates has been informed by a sales representative for station WTOP (also a news and information station), located in the Washington, D.C. metropolitan area, that its 60 second advertising rate in prime time is $450.00.

3. Edmonds Associates was also informed on October 5, 1983, that the following rates apply at the following newspapers for a one-page advertisement in the daily edition of the indicated newspapers:

NEWSPAPERS	AREA	RATES
Los Angeles Times	Los Angeles	$69,110.00
New York Times	New York	$75,088.20
The Washington Post	Washington, D.C.	$55,936.00

4. This Affidavit is made in connection with the lawsuits filed by the Federal Election Commission and the Democratic National Committee, *et al.* against National Conservative Political Action Committee and Fund for a Conservative Majority. If called to testify in this matter, I would testify substantially in accordance with the information contained above.

/s/ Thomas N. Edmonds
THOMAS N. EDMONDS

Subscribed and sworn to before me this 11th day of October, 1983.

/s/ Carolyn C. Knoll
Notary Public
Commissioned:
Carolyn G. Cambini

My Commission Expires: June 1, 1988

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 83-2329
No. 83-2923

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.

v.

NATIONAL CONSERVATIVE POLITICAL ACTION
COMMITTEE, ET AL.

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

AFFIDAVIT

Burns W. Roper, being duly sworn according to law deposes and says that he is Chairman of The Roper Organization, Inc., that he is authorized on behalf of that entity to take this affidavit and that the following facts are based upon his personal knowledge and are true and correct:

1. I was personally in charge of the design and execution of the attached survey—"A Survey Of Public Attitudes Toward Presidential Campaign Financing."

2. The statements and results set forth in "A Survey Of Public Attitudes Toward Presidential Campaign Financing" are accurate, true and correct.

/s/ Burns W. Roper
Burns W. Roper

Sworn to and subscribed before me this 12th day of October, 1983.

/s/ Margot Schenker
Notary Public

A SURVEY OF
PUBLIC ATTITUDES TOWARD
PRESIDENTIAL CAMPAIGN FINANCING

Prepared for

DEMOCRATIC NATIONAL COMMITTEE

October 1983

THE ROPER ORGANIZATION, INC.

FOREWORD

The purpose of this survey was to determine public attitudes toward the ways in which presidential campaigns are and should be financed.

To achieve these purposes, The Roper Organization developed a questionnaire, a copy of which follows this Foreword. This questionnaire was administered to a representative nationwide sample of 1,004 people age 18 and up through the centralized telephone facilities of The Roper Organization in New York City. Interviewing on this survey was started on the evening of Friday, September 30th and was completed on the evening of Saturday, October 1st. Neither interviewers nor interviewer supervisors were informed as to who the client for this survey was, or what its purposes were beyond the simple description that it was designed to determine people's attitudes towards presidential campaign financing.

The sample for this survey was derived from one of our regular ROPER REPORTS personal interview surveys. By that we mean that the phone numbers of respondents who had been personally interviewed in their homes by our nationwide field staff were used as generating numbers for this telephone survey. Developing the sample in this manner has the advantage that, unlike most telephone samples, the survey represents the distribution of the nation's population rather than the distribution of its telephone households. That is, the ROPER REPORTS personal interview sample is designed to be representative of the nation, including both those who do and who do not have telephones. Where respondents in a ROPER REPORTS survey do have telephones, the interviewer secures the telephone number so that the interview can be subsequently validated as to its authenticity.

A description of the ROPER REPORTS personal interview sampling method appears at the back of this report.

A ROPER REPORTS sample consists of 100 clusters of 20 interviews each. To build the sample for *this* survey, ten phone numbers from each cluster of 20 were selected. Each of these numbers was used as a generating number for a new survey respondent in this survey. The new number was generated by subtracting one digit from the ROPER REPORTS respondent's phone number. If no one was at home, or an interview was refused, or no one 18 or over was available, a second digit would be subtracted.

If a cluster of 20 interviews did not contain as many as ten telephone numbers, more than one interview was generated off of each number available. Thus, if a given survey cluster had only five interviews, two interviews were generated off of each of the five numbers, using the subtract a digit method.

To insure that the sample did not consist entirely of stay-at-homes, all interviewing was conducted after 5:30 EDT on Friday and during the day and evening on Saturday.

The respondent selection method employed was to ask for the youngest man aged 18 or over who was at home at the time of the phone call. If no man 18 or over was at home, we then asked for the oldest woman who was at home. The rationale behind this approach is that young men are least often at home; and the oldest women in homes where there is more than one woman tend to be mothers or mothers-in-law who defer to their sons or daughters or in-laws and let them answer the phone. In most households this procedure is more theoretical than real, for most households tend to have only one man and one woman 18 or over.

This system results in a near perfect sex distribution and a near perfect age distribution, if interviewing is conducted at night or on Saturday, as it was. However, age *within* sex is somewhat skewed—somewhat too many *young* men and too few older men; somewhat too many

older women and too few young women. Hence, some weighting is necessary to bring the sample into balance—not by age and by sex, but by age *within* sex.

Entered on the questionnaire which follows this Foreword are the percentage results, after respondent weighting, to each of the questions asked in the survey.

[redacted]

THE ROPER ORGANIZATION INC.

BURNS W. ROPER
Chairman

October 4, 1983

This is to certify that I was personally in charge of the design and execution of this survey.

/s/ Burns W. Roper
BURNS W. ROPER

205 East Forty-Second Street
New York, New York 10017
(212) 599-0700

ROPER REPORTS

METHODOLOGY

Sampling Method

The sample interviewed for each Roper Reports Survey is a representative sample of the population of the Continental United States, age 18 and up—exclusive of institutionalized segments of the population (Army camps, nursing homes, prisons, etc.).

The sampling methodology employed is a multistage, stratified probability sample of interviewing locations.

At the first selection stage, 100 counties are selected at random proportionate to population after all the counties in the nation have been stratified by population size within geographic region. At the second stage, cities and towns within the sample counties are drawn at random proportionate to population. Where block statistics are available, blocks are drawn within the cities and towns at random proportionate to population. Where no block statistics are available, blocks or rural route segments are drawn at random.

A specified method of proceeding from the starting household was prescribed at the block (or route) level. Quotas for sex and age levels of respondents, as well as for employed women, were imposed in order to insure proper representation of each group in the sample. In addition, hours were restricted for interviewing men (on weekends and after 5:00 PM on weekdays) in order to obtain proper representation for employment.

A validation is made by telephone of all interviewers' work.

Exhibit H

THE HARRIS SURVEY

For Release: Monday AM, May 23rd, 1983

1983 #41
ISSN 0273-1037

VOTER DISTRUST OF PACS IS GROWING

By Louis Harris

With the proliferation of political action committees as a major source of financing elections, a strong negative reaction is building among American voters to most PACs.

All of the business PACs studied receive low confidence ratings, according to the latest Harris Survey of 910 voters nationwide taken by telephone between April 7th and 10th:

—By 56-60 percent, people say they would not trust financial backing by a business corporation to a candidate for president in 1984. Specific business PACs are trusted even less by voters. For example, a realtor's PAC contribution would not be trusted by 56-percent of Americans; an insurance company PAC would be distrusted by 61-35 percent; a chemical industry PAC would not be trusted by 68-26 percent; an oil industry PAC contribution would be negatively viewed by 65-31 percent, and a banker's PAC would be distrusted by 59-35 percent.

Labor union PAC contributions to presidential candidates are viewed with about the same degree of suspicion by voters.

—By 62-35 percent, Americans say they would not trust a contribution by a labor union PAC to a candidate for president in next year's election. Among union members, such a monetary gift is viewed negatively by a 50-45 percent plurality. Specifically, a contribution to a

presidential candidate from an AFL-CIO PAC meets with distrust from a 59-36 percent majority of voters. Union members would not trust such AFL-CIO PAC contributions by 58-39 percent, not very different from non-union reactions.

An assortment of Moral Majority and right-wing PACs also meet with a negative response from the voters:

—By 62-32 percent, a majority would not trust a Moral Majority PAC contribution to a candidate for president next year. An almost identical 63-33 percent majority feels the same way about an anti-abortion PAC; a 60-32 percent majority doesn't take kindly to political contributions from NCPAC (National Conservative Political Action Committee), a 61-35 percent majority would not trust a contribution from an anti-gun control PAC, and a 67-29 percent majority would be suspicious of an anti-Equal Rights Amendment PAC.

Groups that have generally lined up in opposition to the conservative movement in politics fare somewhat better:

—By 61-35 percent, many Americans say they would trust the backing of a presidential candidate by a consumer organization PAC. By 51-44 percent, a closer majority is positive about a political contribution from a pro-environmental PAC.

Of 19 separate PACs tested by the Harris Survey, only these two won a positive reaction from the voters.

—Other anti-conservative PACs received a negative rating from the voters, but generally the division was fairly close. For example, by 52-44 percent, a majority would be negative about a monetary gift from a pro-ERA PAC; women were negative by a closer 49-44 percent. A pro-nuclear freeze PAC contribution would not be trusted by 53-43 percent. A pro-gun control PAC gift would be negatively viewed by 60-35 percent, as would pro-abortion PAC support by 59-36 percent.

Implicit in these results is the growing distrust Americans feel about special interest groups that use political contributions to influence the decisions of a president after Election Day. Voters seem to feel that the connection between contributions to a candidate and demands made later on a president is basically unhealthy for the political process.

Some of the announced candidates for the Democratic presidential nomination have said they would not accept PAC money if it were offered to them. From the evidence in this Harris Survey, such a stand is bound to please voters. By 1984, taking PAC money might be so unpopular that it will no longer play a part in presidential elections. A candidate for the White House may no longer be able to run the risk of addressing accusations of having "sold out" to a particular interest group.

TABLES

Between April 7th and 10th, the Harris Survey asked a cross section of 1,019 voters nationwide by telephone:

"Many business, labor, and other groups have formed political action committees, or PACs, that support and give money to candidates for office. How much would you trust (READ EACH ITEM) if that group were to support and give money to a candidate for president in 1984 —a great deal, somewhat, not very much, or not at all?"

TRUST IN PACS THAT GIVE MONEY
TO A PRESIDENTIAL CANDIDATE

	A Great Deal	Somewhat	Not Very Much	Not At All	Not Sure
	%	%	%	%	%
A consumer organization PAC	33	42	18	17	4
A pro-environmental PAC	15	36	24	20	5
A pro-nuclear-freeze PAC	13	31	25	28	4
A pro-ERA, or Equal Rights Amendment, PAC	11	30	29	23	4
An anti-abortion PAC	11	22	24	39	4
A pro-gun-control PAC	10	23	25	36	6

	A Great Deal	Somewhat	Not Very Much	Not At All	Not Sure
	%	%	%	%	%
An anti-gun-control PAC	9	26	26	29	4
A pro-abortion PAC	7	20	27	32	5
An AFL-CIO PAC	7	20	27	32	5
An insurance company PAC	7	19	29	32	4
A labor union PAC	7	18	30	32	3
An oil industry PAC	7	24	28	37	4
A business corporation PAC	6	24	30	36	4
A banker's PAC	6	20	29	39	5
A pro-Moral Majority PAC	6	20	27	33	6
An anti-ERA, or Equal Rights Amendment, PAC	5	15	20	37	5
A chemical industry PAC	5	21	22	38	6
A realtors' PAC	4	24	23	35	6
NCPAC, or the National Political Conservative Committee	4	19	12	19	6

METHODOLOGY

This Harris Survey was conducted by telephone with a representative cross section of 910 voters within the United States between April 7th and 10th. Figures for age, sex and race were weighted where necessary to bring them into line with their actual proportions in the population.

In a sample of this size, one can say with 95% certainty that the results are within plus or minus 3.5 percentage points of what they would be if the entire adult population had been polled.

This statement conforms to the principles of disclosure of the National Council on Public Polls.

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822102

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

April 16, 1984

Charles N. Steele, Esq.
General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: Federal Election Commission v. National Conservative Political Action Committee, et al., No. 83-1032; and Democratic Party of the United States and Democratic National Committee v. National Conservative Political Action, No. 83-1122

Dear Mr. Steele:

The Court today entered the following order in the above case:

> "The motion of Gulf & Great Plains Legal Foundation, et al. for leave to file a brief as amicus curiae is granted. In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument."

Enclosed are memorandums describing the time requirements and procedures under the rules. Please read them carefully.

I have been instructed to inform you that Rule 24.1(c) is satisfied by having the initial sheet in the brief state the "Questions Presented" without more. Counsel should not have printed on this page the title of the case or any other descriptive matter. A sample sheet is enclosed.

The additional docketing fee of $200, Rule 45(a), is due and payable.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By /s/ Jane M. Hoffmann
(Miss) JANE M. HOFFMANN
Assistant Clerk

Enclosures

APPELLEE'S

BRIEF

Office - Supreme Court, U.S.
FILED
AUG 31 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-1032 and 83-1122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION,
Appellant,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE

and

FUND FOR A CONSERVATIVE MAJORITY,
Appellees.

DEMOCRATIC PARTY OF THE UNITED STATES, *et al.*,
Appellants,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE

and

FUND FOR A CONSERVATIVE MAJORITY,
Appellees.

On Appeals from the United States District Court for the Eastern District of Pennsylvania

---

BRIEF FOR APPELLEES NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE AND FUND FOR A CONSERVATIVE MAJORITY

ROBERT R. SPARKS, JR.*
J. CURTIS HERGE
SEDAM & HERGE, P.C.
Suite 1100
8300 Greensboro Drive
McLean, Virginia 22102
Counsel for Appellees

* Counsel of Record

August 31, 1984

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QUESTIONS PRESENTED

1. Whether Congress intended when it passed 26 U.S.C. § 9012(f)(1) that it apply to independent expenditures by political committees, made outside a publicly-financed presidential candidate's campaign, and not made in cooperation or consultation with the candidate or his campaign.

2. If so, whether, after *Buckley v. Valeo*, 424 U.S. 1 (1976), Congress constitutionally may limit the amount of money that political committees may spend as independent expenditures to further the election of a publicly-financed presidential candidate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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On Appeals from the United States District Court for the Eastern District of Pennsylvania

---

BRIEF FOR APPELLEES NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE AND FUND FOR A CONSERVATIVE MAJORITY

STATEMENT OF THE CASE

A. The Fund Act

The Presidential Election Campaign Fund Act of 1971 ("the Fund Act"), 26 U.S.C. § 9001 *et seq.*, provides for public financing of presidential general election campaigns

as a voluntary alternative to private fundraising by candidates. Under the Fund Act, those candidates who accept public financing must pledge that neither they nor their authorized committees[1] will incur campaign expenses in excess of the amount of public funds received, and that they will not accept private contributions to defray such expenses. 26 U.S.C. § 9003(b).[2] That is the core of the Fund Act; most of the remaining provisions deal with procedures for receipt of and accounting for expenditure of the funds received and related "housekeeping" items.

But not all of the other provisions of the Fund Act are so benign. There is one portion of that Act that appellants claim limits expenditures by outsiders, even those unconnected with the candidate or his authorized committees. Section 9012(f) forbids expenditures in excess of $1,000 by political committees, if those expenditures tend to further the election of a publicly-financed presidential or vice presidential candidate.[3] Any officer or member of a political committee who violates section

---

[1] An "authorized committee" is "any political committee which is authorized in writing by [a candidate] to incur expenses to further the election of such candidate." 26 U.S.C. § 9002(1).

[2] The Fund Act's restrictions on private contributions apply only to the general election. There is no similar restriction on contributions during the primary election period. Indeed, the amount of the public grant to a candidate at the primary election stage depends in part on the size and number of private contributions that candidate is able to raise. 26 U.S.C. § 9034.

[3] Section 9012(f)(1) reads as follows:

> Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

A political committee is defined in the Fund Act as "any committee, association, or organization (whether or not incorporated)

9012(f)(1) is subject to a fine of up to $5,000, or one year imprisonment, or both; and the committee itself may be fined a like amount. 26 U.S.C. § 9012(f)(3).

Sections 9012(f)(2)(A) and (B) exempt from the operation of section 9012(f)(1) expenditures by broadcasters or by periodical publications in reporting the news or in taking editorial positions, as well as expenditures by tax-exempt organzations in communicating to its members the views of that organization.

B. Appellees

Appellees, National Conservative Political Action Committee ("NCPAC") and Fund for Conservative Majority ("FCM") are multicandidate political committees.[4] Both are registered as political committees with the Federal Election Commission ("FEC"), pursuant to 2 U.S.C. § 433, Federal Election Campaign Act of 1971, as amended ("FECA"), and all of their receipts, contributions and expenditures are fully disclosed in public reports filed with the FEC, as required by 2 U.S.C. § 434.

In 1980, because Mr. Reagan accepted public financing of his 1980 campaign, appellees could not make contributions to Mr. Reagan or to his authorized committees. Instead, they engaged in independent expenditures[5] out-

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which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. § 9002(9).

An "eligible candiate" is one who has met the Fund Act's criteria for receiving public funding of the candidate's campaign. 26 U.S.C. § 9002(4).

[4] A multicandidate political committee is "a political committee which has been registered under [2 U.S.C. § 433] . . . for a period of not less than 6 months, which has received contributions from more than 50 persons, and . . . has made contributions to 5 or more candidates for Federal office." 2 U.S.C. § 441a(a)(4).

[5] An independent expenditure is "an expenditure by a person expressly advocating the election or defeat of a clearly identified

side of his official campaign, intended to aid in his election.

Both NCPAC and FCM have announced their intention to engage in independent expenditures in support of Ronald Reagan again in 1984. It is likely that the President will elect to receive public funding of his 1984 campaign. This year, the public grant will be on the order of $40 million to each candidate. In 1980, the candidates of the major parties each received almost $30 million.

C. The Proceedings Below

The appellants in No. 83-1122 are the Democratic Party of the United States and the Democratic National Committee. Appellant in No. 83-1032 is the FEC.

The Democrats filed their district court complaint on May 16, 1983, seeking a declaration that section 9012(f), construed to limit independent expenditures by political committees, was constitutional on its face. Not long after, on June 14, 1983, the FEC filed its own complaint, also seeking a declaration that section 9012(f), similarly construed, was constitutional. The FEC also moved to intervene in and dismiss the Democratic Party's lawsuit, contending that, as private parties, the Democrats had no private right of action under the Fund Act to seek a declaration of the constitutionality of section 9012(f). NCPAC and FCM made a similar argument.

A three-judge district court was convened, pursuant to 26 U.S.C. § 9011(b)(2). J.S. App. 13a n.6.[6] The cases were consolidated and the parties aligned. After two rounds of briefing, one on procedural issues and one on

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candidate which is made without cooperation or consultation with any candidate, any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17).

[6] "J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the FEC and which reprints the district court's opinion. That opinion is reported at 578 F.Supp. 797.

the merits, and after arguments on a stipulated record and affidavits, the district court, on December 12, 1983, issued its decision. The court concluded that section 9012(f), on its face, "abridges speech and association protected by the first amendment," and that it was substantially overbroad. J.S. App. 99a.

The district court opinion dealt first with the objections of appellees and the FEC to the Democratic Party's claimed right, under 26 U.S.C. § 9011(b)(2), to seek a declaration of the constitutionality of section 9012(f). The court found such a right,[7] J.S. App. 13a-36a, and proceeded to the merits of appellants' claim that the statute was constitutional, and appellees' assertion that it was unconstitutional on its face.[8]

The court began by analyzing section 9012(f) and its apparent effect on groups like NCPAC and FCM. First, it found that the statute regulated independent expenditures. In doing so, it implicitly rejected appellees' argument that the legislative history of section 9012(f) demonstrated that it was not intended by Congress to apply to such expenditures.

The court then reviewed the holding of *Buckley v. Valeo*, 424 U.S. 1 (1976), and later explications of that hold-

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[7] Appellees do not have renew their standing argument against the Democratic Party. If, as appellees believe, section 9012(f) is facially invalid, that issue will be moot. The other provisions of the Fund Act address the administration of the Act by the FEC and the permissible and prohibited uses by candidates and their committees of monies received under the Act. We do not believe that they apply to groups like NCPAC and FCM.

In any event, it now appears that the FEC's arguments against the Democrats' right of action at this stage of the proceedings (FEC Brief ("FEC") at 49-50) is essentially a "turf fight" in which NCPAC and FCM do not wish to participate.

[8] Contrary to the district court's assertion that appellees have not asked that section 9012(f) be declared unconstitutional, J.S. App. 99a n.66, appellees did so ask. *See* Defendants' Answer to FEC's Complaint, filed July 28, 1983.

ing, which struck down a provision almost identical to that at issue here. After *Buckley*, the court held, and certainly after *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), only the prevention of corruption or its appearance could justify the regulation of independent expenditures. The court turned back appellants'[9] attempts to distinguish section 9012(f) from the constitutionally flawed provision in *Buckley*. It also refused to accept their assertion that this Court's decision in *Federal Election Commission v. National Right to Work Committee*, 103 S.Ct. 552 (1982), somehow undid the holding of *Buckley* and its application to section 9012(f). J.S. App. 43a-60a.

The trial court reviewed appellants' evidence of "corruption" and found it unpersuasive or not corruption at all. Some of the evidence, consisting of press reports of supposed favors accorded to appellees' contributors, and author Elizabeth Drew's suspicions about independent expenditures, did not alarm the court. The other evidence consisted of the results of telephone polls which, appellants claimed, showed voter distrust of independent expenditures. The court explained why these results were no help to appellants. *Id.* at 61a-68a.

None of this was evidence of "corruption," as the court understood the term. The court simply did not see any "new and significant evidence" that appellees' activities and their aftermath appeared to corrupt, the sort of evidence it required before it would uphold a provision like section 9012(f) after *Buckley*. *Id.* at 60a.

The district court rejected the argument that section 9012(f) could be upheld as necessary to augment the rest of the Fund Act, to make up for the fact that the FEC had tried, but failed, to find that appellees had unlawfully coordinated their 1980 activities with the Reagan

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[9] As used in this Brief, the term "appellants" includes *amicus curiae* Common Cause.

campaign.[10] Each provision must be judged on its own, the court held. J.S. App. 79a-87a. It would not do to try to shore up a constitutionally suspect provision on the ground that it was simply part of an otherwise constitutional statutory scheme, which this Court held the Fund Act to be in *Buckley*.

Section 9012(f) was also overbroad, the court held, *id.* at 37a-39a, 93a-98a, because it regulated far more protected expression than necessary to achieve the only permissible goal of an expenditure limitation: the prevention of real or apparent corruption. Besides, the court noted, those goals were already achieved through prohibitions on coordinated expenditures elsewhere in the federal election law. Section 9012(f) was not only broader than necessary, it was largely unnecessary altogether, in order to safeguard against corruption. *Id.* at 98a.

SUMMARY OF ARGUMENT

Section 9012(f)(1) of the Fund Act does not distinguish between independent and other kinds of expenditures by political committees in publicly funded presidential general elections. It simply forbids expenditures in excess of $1,000 by such groups. Congressional debate at the time it was passed into law, however, demon-

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[10] In May 1980, the FEC completed a 22-month long investigation of NCPAC and FCM, prompted by complaints, filed by the Carter-Mondale Committee and Common Cause, that appellees and others had unlawfully coordinated their 1980 pro-Reagan efforts with the official Reagan campaign. Coordinated expenditures are deemed to be contributions, 2 U.S.C. § 441a(7)(B)(i), subjecting the contributor, the candidate and his authorized committees to civil and criminal penalties. 26 U.S.C. §§ 9007, 9012(a); 2 U.S.C. § 437g.

The FEC had subpoenaed thousands of pages of documents and had interviewed witnesses inside and outside the campaign. After all that, the general counsel could find no "concrete evidence of cooperation and coordination" between appellees and the 1980 Reagan campaign. *In re Ronald Reagan*, Matter Under Review (MUR) 1252/1299. The Commission adopted its general counsel's report and closed the file.

strates that that provision was not aimed at independent expenditures. It was, instead, intended to regulate the candidates themselves, for under the Fund Act, candidates who accept public funding of their campaigns must forswear private contributions. Section 9012(f) was intended to prevent publicly-financed candidates from evading that restriction by accepting expenditures by supporters outside the campaign, made at the request, or with the cooperation, of the candidate.

If, however, the Court concludes that section 9012(f) regulates independent expenditures—those made without the cooperation or request of the candidate—then *Buckley v. Valeo* invalidates that provision, for in *Buckley* this Court established two propositions that are dispositive of these appeals: (1) expenditures for the purpose of furthering the election of a candidate for elective office are political speech protected by the First Amendment; (2) when those expenditures are independent of, and not coordinated with, a candidate's campaign, there is almost no compelling governmental interest sufficient to justify the regulation of such expenditures. Since *Buckley*, those propositions have been reaffirmed in *Republican National Committee v. Federal Election Commission*, 487 F.Supp. 280 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2nd Cir.) (*en banc per curiam*), *aff'd summarily*, 445 U.S. 955 (1980). The same statute at issue here was also before the Court in *Common Cause v. Schmitt*, 512 F.Supp. 489 (D.D.C. 1980), *aff'd by an equally divided court*, 455 U.S. 129 (1982), which struck down the statute based on *Buckley*.

The Court's decision in *Buckley* was carefully crafted to permit Congress to regulate the conduct of elections without unnecessarily crowding the First Amendment freedoms of a candidate's supporters—the voters. *Buckley* has been cited and followed by courts, high and low, in their review of this nation's election laws. We believe this Court meant what it said in *Buckley*: except

to prevent the appearance or reality of corruption, expenditure limitations are constitutionally impermissible, and *independent* expenditures do not corrupt. 424 U.S. at 47. The Court should say so again, and put an end to what by now has become quadrennial litigation over section 9012(f). What the court said in *Buckley* is as true today as it was then: "[I]ndependent advocacy does not presently pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46. There is still no evidence that independent advocacy by political committees has a real or apparent deleterious effect on presidential elections. The Court should make clear that its observation in *Buckley* was not an invitation to relitigate that case every four years.

OVERVIEW

A. How NCPAC And FCM Operate

Political committees are much in the news in this election year. These committees, also known as political action committees or PACs, are praised by some for bringing a new accountability to politics through the stiff reporting and disclosure requirements which are imposed on them, and condemned by others for corrupting the politicians to whom they make contributions. The proliferation of PACs,[11] their critics cry, has led to government by faction; not so, claim their supporters, who contend that the diversity of PACs simply reflects the diversity of society today, in which groups of citizens have joined together on issues, rather than along party lines. In its election law reforms of the 1970's, Congress legitimized PACs and opened them up as vehicles for the expression of many different viewpoints, not just those of the unions and businesses who occupied the field almost

[11] The parties have stipulated that as of July 1, 1983, more than 3,400 political committees had registered with the FEC. Jt. Stip. 165; J.A. at 52.

alone up to that time.[12] Now PACs are being used, and used effectively, by all manner of interests, and appellants are alarmed.

Common Cause has crusaded long and loud against political committees, but in its zeal to rid the political scene of PACs, it has overlooked some critical differences between groups like NCPAC and FCM, on the one hand, and garden variety PACs that contribute directly to candidates, on the other. That is a distinction that made all the constitutional difference in *Buckley*: "the actuality and appearance of corruption" was a "constitutionally sufficient justification" for limiting campaign *contributions*. 424 U.S. at 26. But "the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify" independent *expenditure* limitations. *Id.* at 45. It is a distinction that all of the appellants seem to have overlooked or ignored.

NCPAC and FCM are different from the vast majority of political committees for several reasons. First, they are independent of a monied parent that is interested chiefly in advancing its legislative interests through the election of candidates favorable to its viewpoint. Appellees are not trade association, union or corporate PACs. Under FECA, such groups cannot participate directly in federal elections, but their political committees can, and do. But that it not what is involved in this case.

Second, appellees do not make either direct or in-kind contributions to presidential candidates. What they do—what they did in 1980 and what they intend to do in 1984—is to make independent expenditures which they and their contributors hope will see their candidate elected. The only lead NCPAC and FCM follow is that

[12] For a brief review of the history of PACs, their recent growth, and a summary of the arguments for and against them in their current incarnations, *see* Herbert L. Alexander, *The Case for PACs*, A Public Affairs Monograph.

of their contributors, for without those contributions, appellees can do nothing.

Third, as their names imply and as their mailings make explicit, NCPAC and FCM are ideological groups. They are motivated by politics, not the desire for financial gain or special privilege. They are dedicated to politics in its purest form: the election of candidates who suit the conservative views of their contributors. To achieve this goal, NCPAC and FCM raise funds from their contributors, just as Common Cause and the Democratic Party do their work with funds from their contributors.

B. How NCPAC And FCM Amplify the Speech of Their Contributors

Appellees have raised large sums of money over the years through the contributions of hundreds of thousands of contributors.[13] Because individuals cannot contribute more than $5,000 per year to a political committee, appellees are not beholden to any particular contributor. In fact, their lifeblood is the small contributor whose typical annual contribution reflects his modest means.[14]

[13] There were approximately 244,000 contributors to NCPAC during the period 1979-82; FCM had 293,550 contributors during the period 1978-83. *See* Joint Stipulations ("Jt. Stip.") 195, 202; J.A. at 56-57.

[14] For example, in the 1979-80 election cycle, the average contribution to NCPAC was $75.00; to FCM, $29.00. Jt. Stip. 142, 202 and 195; J.A. at 47, 57 and 56. Compare also the small number of "high dollar" ($500-$5,000) contributors to FCM during the period 1978-83, *with* the total number of contributors for that period (579 out of 293,550). Jt. Stip. 172, 195; J.A. at 53, 56. The same is true for NCPAC. *Compare* Jt. Stip. 149-150; J.A. at 49 *with* Jt. Stip. 202; J.A. at 57 (2,110 out of 244,000).

The fact that small contributions predominate has served "to mute the voices of affluent persons" in deciding how NCPAC and FCM conduct their activities. These groups have permitted contributors of modest means to pool their contributions and to contend effectively with wealthy individuals and even wealthier political parties. In short, they have served "to equalize the relative ability of all citizens to affect the outcome of elections." *Buckley*, 424 at 26.

These contributors know where their money is going and what NCPAC and FCM intend to do with it. Their mailings are direct and to the point. The text of their messages and the titles of their pro-Reagan projects leave no doubt as to why they are soliciting funds.[15] In 1980, Ronald Reagan was a prominent feature of those mailings, and both NCPAC and FCM made explicit their intention to do what they could to assist in Mr. Reagan's election effort.[16]

Appellants' suggestion that expenditures by groups like NCPAC and FCM are really just the speech of their managers and not an expression of the views of their contributors is wrong. (FEC at 5; Democratic Party Brief ("Dem.") at 16-17.) The sheer number of contributors who have responded over the years to explicit fundraising solicitations demonstrates that people contribute to NCPAC and FCM because they know what those groups stand for, and they like it. These contributors also know what their money will be used for, and they like that, too. If they did not support those groups' activities, they would not contribute, just as people would not contribute to Common Cause or to the Democratic Party if they did not agree with what those groups stand for and what they say and do. Thus, the contention that appellees' expenditures are actually the speech of their managers is not only wrong, it does not make sense.[17]

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[15] NCPAC's 1980 pro-Reagan effort was called "Ronald Reagan Victory Fund." FCM's project was known as "Citizens for Reagan in '80." Jt. Stip. 46 and 100; J.A. at 31 and 29. In 1984, all of NCPAC's fund-raising efforts include the name "Reagan." FCM's effort is called "Citizens for Reagan in '84."

[16] *See, e.g.*, excerpts from NCPAC and FCM fund-raising solicitations during the 1979-80 primary election, quoted at Jt. Stip. 47-49 and 100-101; J.A. at 31-32 and 39-40. The mailings of other pro-Reagan groups were just as explicit. *See* Jt. Stip. 108-109; J.A. at 41.

[17] Moreover, even if the independent speech at issue here is that of the groups or their leaders, it does not forfeit its constitutional protection on that account. Contributions to NCPAC and FCM are not compelled, like dues; they are asked for and voluntarily given. There is no reason—certainly none is advanced by appellants—why individuals or groups cannot use contributions that are voluntarily given for that purpose to express *their* own political views.

The committees themselves have a right of free speech, just as individuals have such a right. "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 767, 777 (1978). Of course, *Bellotti* involved corporate speech in a referendum campaign and reserved judgment on the constitutionality of a restriction on such speech in a candidate election. 435 U.S. at 788 n.26. But "advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Buckley*, 424 U.S. at 48.

In any event, nothing in *Bellotti* limited the right of individuals to use others' money, freely given, to express themselves, and the principle established in *Bellotti*—that the protection afforded speech does not turn on the source of that speech—applies with equal force here, particularly where the speech is independent of a candidate's campaign.

There is another point that should not be overlooked here. The ability of NCPAC and FCM to raise funds for independent expenditures is a product of the popularity of the candidate with their contributors. Contributors to political committees do not give because they expect something in return; they give because they like the candidate. The financial resources that political committees can muster for independent expenditures "will normally vary with the size and intensity of the candidate's support." *Buckley*, 424 U.S. at 56. NCPAC and FCM are really vehicles for expression by their contributors of their support for a candidate. If that support were not present, NCPAC and FCM would not be a concern to appellants, for appellees live by the highest form of accountability. If their views do not match those of their

contributors, those contributors will give no more, and groups like NCPAC and FCM will vanish.

The success of groups like appellees in raising funds for independent expenditures in presidential campaigns hardly argues for the constitutionality of a restriction on such expenditures. Rather, it demonstrates that citizens are willing and eager to contribute money to independent groups to make themselves heard, even though they have no hope or expectation of "buying influence" with a candidate. Although they cannot give directly to the candidate of their choice, they want to be heard.

The district court in the 1980 litigation over section 9012(f) put it this way:

> Politics is, after all, the unifying theme among members of political committees; their associational tie is the desire to affirm publicly their political viewpoint held in common. The organizers of political committees really only mobilize existing political sentiment looking for an outlet—the small size of contributions freely given by diverse contributors expecting no personal glory or prospects of hobnobbing with celebrities attests to that.

Common Cause v. Schmitt, 512 F. Supp. at 500.

Appellants must know that their arguments are belied by common sense and the law, but they have to try to take this case out of the reach of *Buckley* and, if they can, liken it to a contributions case. If appellants can somehow persuade this Court that what is really at issue here are contributions to a candidate, then they can rely on *California Medical Association v. FEC*, 453 U.S. 182 (1981), in which a plurality of the Court characterized contributions to political committees as merely "speech by proxy," and "not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." 453 U.S. at 196. The sort of advocacy that is entitled to such protection is just the sort of advocacy

engaged in by appellees here—independent political *expenditures*. It is not the right of contributors to give to groups like NCPAC and FCM that is at issue here; it is the right of those groups to spend those contributions.

That is the nub of appellants' problem. If they concede that this is an expenditures case, then they are faced with *Buckley*; and if it is an expenditures case and, if this Court believes that Congress intended that section 9012(f) apply to appellees' expenditures, then *Buckley* is clear: the statute cannot survive.

Moreover, in *Bellotti*, the Court noted that its cases involving restrictions on group speech were "based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." 435 U.S. at 783 (citations omitted). Rather than arguments over the true source of independent advocacy or whose speech is actually regulated by section 9012(f), the proper focus is on the choking effect of section 9012(f) on alternative sources of election advocacy. Under appellants' view of section 9012(f), a host of speakers and ideas will be cut off, to the detriment of the First Amendment rights of those silenced and at the cost of public access to alternative sources of political debate and ideas. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti*, 435 U.S. at 784-85.

C. Why Expenditures by NCPAC and FCM are Independent Expenditures

To avoid *Buckley*, appellants also have tried another tack. Because that case accorded full protection to *independent* expenditures, they suggest that appellants' activities are not really independent and that *Buckley* is therefore inapplicable. (Dem. at 28-29; FEC at 24-25.)

Appellants are trying to convince this Court of something that the FEC could not prove after almost three years of investigation of appellees and their 1980 activities.[18] To do that, they point to various relationships between past and present directors of NCPAC and FCM, on the one hand, and members of the Reagan administration, other Republicans and conservatives, on the other.[19] All of these facts were readily stipulated to by NCPAC and FCM, and appellants argue, by innuendo and surmise, that they show that those groups wrongfully coordinated their 1980 pro-Reagan activities with the campaign, and that they taint their 1984 activities, as well.

They show nothing of the sort. Appellants' use of common vendors and the relationships between their board members, Republicans and conservatives is unremarkable. Indeed, it would be remarkable if such relationships did not exist. It should come as no surprise to the Court that those in the political consulting, direct mail and polling fields work on one side of the political spectrum or the other, but not both. These relationships may show that those inside and outside of the Reagan campaign know each other, but they do not demonstrate coordination.

But there is more. Not only is there no evidence that appellees have illegally coordinated their activities with the official campaign, there is evidence that they have *not* done so. For example, in 1979, then-candidate Ronald

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[18] *See supra* note 10.

[19] The Court should bear in mind in reviewing appellants' evidence of "coordination" in connection with the 1980 presidential primary campaign, *e.g.*, Jt. Stip. 93-103; J.A. at 28-40, that such parallelism during the primary season is *not* illegal under the law. The Presidential Primary Matching Payment Account Act (26 U.S.C. § 9031, *et seq.*), which operates during the primary election period, does not contain a provision comparable to section 9012(f) of the Fund Act. Section 9012(f) does not operate until after a candidate has received his or her party's nomination and has qualified to receive public funding under the Fund Act.

Reagan sent FCM a mailgram urging the group to stop its planned independent expenditure effort.[20] FCM ignored the request. In May 1981, it was reported that the Chairman of the Republican National Committee met with the leaders of FCM and NCPAC, and others, to review the effect of independent expenditures on the President's campaign. As reported in the press, the meeting was acrimonious.[21] The evidence suggests that in 1980 independent expenditures were not appreciated by the official campaign. "My quarrel is that independent expenditure groups butt in on the strategy of the campaign," Mr. Richards is quoted as saying. "The problem is they stay too long, they say the wrong things and ultimately they may be counterproductive."[22] Jt. Stip. 60; J.A. at 34.

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[20] Jt. Stip. 198; J.A. at 56.

[21] Jt. Stip. 56-60; J.A. at 33-34.

[22] There is evidence that appellees' 1984 efforts are no more appreciated than they were in 1980. On August 16, 1984, NCPAC called a press conference to announce that it intended to air advertisements that featured former EPA Administrator Anne Burford criticizing Geraldine Ferraro's failure to disclose certain financial information concerning her family's finances. On August 17, The Washington Post ran a front page story reporting NCPAC's plans. It also gave considerable play to White House disclaimers of any connection with the advertisements, and quoted Ed Rollins, Director of Reagan-Bush '84, as saying in a nationally distributed statement that the campaign had had no discussions with NCPAC on the matter. "The Reagan-Bush campaign protested and urged her [Mrs. Burford] not to do this," press secretary Larry Speakes is quoted as saying. "It's not the way we want to run the campaign." At A1. It is hard to imagine a more vivid example of a lack of coordination.

Whether or not these reports are true is beside the point. What is important is that the public receives as many reports suggesting that independent expenditures are not helpful as it does that the opposite is true. It is therefore unlikely that the average voter believes that groups like appellees are undermining the independence of the President or his administration.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE FUND ACT DEMONSTRATES THAT CONGRESS NEVER INTENDED SECTION 9012(f) TO LIMIT INDEPENDENT EXPENDITURES

Section 9012(f) was part of the Fund Act as introduced by Senator Pastore. The debate surrounding section 9012(f) suggests a congressional concern that publicly funded candidates not be permitted to defray campaign expenses either by accepting private contributions or by accepting the virtually identical benefit of expenditures conducted outside the campaign, but at the candidate's urging or with his cooperation. The common thread between contributions and coordinated expenditures is that they are both within the control of the candidate. Congress wished to prevent candidates from circumventing the expenditure limit by requesting unauthorized committees to incur campaign expenses. That seems to have been the nature and extent of congressional concern when section 9012(f) was enacted.[20] It was not a cap on what

[20] The FEC and Common Cause have woven together excerpts of statements made by various legislators through the years on section 9012(f) and its predecessors in an effort to show that Congress knew just what it was doing when it debated and passed that provision. Unfortunately, congressional debate is not as clear as it might be on that score.

We have relied on the statements of Senator Pastore, the Fund Act's sponsor, because it seemed likely that, more than any other legislator, he would have known what was really intended when that provision was passed. There is, of course, no assurance of that, but his intention that independent expenditures not be covered by that section seems fairly clear. At one point, however, Senator Pastore did state that section 9012(f) was aimed at "certain parties who have no direct contact with the candidate, but only because they like his views on issues they want to support him." 117 Cong. Rec. at 42,399. Who those parties might have been is not clear, but it is unlikely that he had in mind long-lived, broad spectrum, ideological groups like appellees. Such groups did not exist in 1971 when the Fund Act was passed; nor was there then

outsiders could spend; it was intended as a way of ensuring that publicly-financed candidates stayed within the budget they received under the Fund Act.

Senator Taft tried to enlarge the scope of section 9012(f) to include independent activity and to place an overall cap on what could be spent in presidential elections. To accomplish that, he proposed that section 9012(f) reach "any corporation, labor organization, partnership, association, political committee, political education committee, or any other committee." He made clear that his amendment was designed to ensure that the dominant PACs at the time the Fund Act was debated, groups such as COPE, were included within section 9012(f). *Id.* at 42,397. Senator Pastore stiffly resisted that attempt to reach independent groups:

> MR. PASTORE: [L]et us assume that a group on a campus, say faculty members, got together and formed a committee. Does the Senator mean to tell me they would have to get the permission of the candidate to be authorized to make a statement in his support? Do we not get into freedom of speech here?
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> MR. TAFT: I do not believe freedom of speech would apply except to an individual.
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> MR. PASTORE: I am talking about a committee, a committee of faculty members say at Columbia University who might get together and buy radio time for $1,000 to broadcast their support. Would they have to get the permission of the candidate?
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> MR. TAFT: I suggest if the amount put on as a limitation of expenditures, as an attempt to put an overall limit on expenditures in presidential campaigns is included, if this is to have meaning, it has to have that.

any evidence of corruption springing from such independent expenditures. Such evidence did not exist even in 1976 when the Court considered the issue in *Buckley*.

MR. PASTORE: There is a distinction. Usually a political committee is formed for the purpose of directly aiding that candidate and there is no question about being authorized by that candidate. We wrote something to that effect in the other bill [FECA]. How far are we going to go without obligating independent organizations and committees furthering the promotion of a particular candidate on their own?

I know what the Senator is trying to accomplish but I am wondering on this amendment whether or not we may be opening Pandora's box. There is no question about what the Senator said.

Id. at 42,398. Senator Pastore explained his opposition to Senator Taft's proposal:

> I do not want to begin to strait-jacket organizations that have a legal right, because of the character of their constitution, to proceed to express their personal opinion without permission from or obligation to the candidate they favor. I do not feel that they should have to get his permission or be subject to a fine. That is getting into pretty dangerous territory.
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> I do not want any outsider to make a contribution—I do not care what the organization is—unless the person comes under it. But this goes a step further. The reason why it was put in the law was to recognize the fact that somewhere along the line are certain parties who have no direct contact with the candidate, but only because they like his view on issues they want to support him. They do not want to get permission to be authorized, because they are independent in that respect. On the other hand, they do not want to subject themselves to a fine.

Id. at 42,399. Later, Senator Pastore seemed to have focused his thoughts more clearly on the reach of section 9012(f). He did not intend that it apply to:

> an independent, unauthorized committee that functions on its own, without any contact with the candidate himself—because the candidate has not become a party to the transaction because otherwise indirectly it is authorized—but any group acting on its own. I gave the example of the college campus group that gets together on behalf of a Republican or a Democratic candidate and they publish a pamphlet urging the candidacy of Mr. Nixon, say, at a cost of $1,500. The question is, Are they subject to a $5,000 fine? I asked that question, and the Senator from Ohio said "Yes."
>
> That is what bothers me. That is what bothers me.

Id. at 42,401. Senator Pastore declared that:

> anyone is entitled to think as he likes and to say what he thinks. He is not authorized by the candidate to do so. He gets together a committee because they think it is to their advantage, whether school teachers, COPE, or some other group. And they issue an article that costs $1,500. The candidate does not know what it is about. He never heard of the article, much less read it. Under this law [the Taft Amendment] this group would be subject to a $5,000 fine. It is hard for me to buy. It is close to the line.
>
> I repeat that there is a lot of substance in what the Senator is saying. However, we are dealing in a very sensitive area. I will tell the Senator, frankly, that I do not have the perfect answer.

Id.

Later, in response to a question, Senator Pastore elaborated on what section 9012(f) did and did not do. No other Senator challenged his view:

> MR. MAGNUSON: I want to ask the Senator from Rhode Island a question that has been bothering me throughout this debate. This may not be a loophole. Suppose a group of people wanted to get together to support Mr. A for President, and they are going to devote their time to go out and do what they can

for him. They may hire a hall for a mass meeting. Would that be in violation?

MR. PASTORE: Does the Senator mean if they acted on their own?

MR. MAGNUSON: They would get together. I suppose it would be difficult to act on their own. Perhaps they would have a meeting place where they rent a hall, and they would spread out on election day to go to the polls to support Mr. A. There would be no money raised except their own expenses, which would amount to nothing, comparatively.

MR. PASTORE: That raises a very sensitive area. We struggled with that on the campaign expenditures limitations. The Senator is talking about individuals who, absolutely independent of the candidate, on their own made some effort?

MR. MAGNUSON: Yes.

* * * *

MR. PASTORE: To answer the Senator, *we do nothing to impinge upon freedom of speech and freedom of activity. So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will.*

Id. at 42,626. (emphasis added) The Taft amendment failed. Senator Pastore had every opportunity to make clear that section 9012(f) applied to independent groups, but he refused. Instead, he opposed Senator Taft's every effort to extend that provision to cover independent activities, even those by large, well-financed and well-organized groups like COPE.

When Congress enacted section 9012(f), then, whatever else that section may have been intended to accomplish, it was not intended to reach independent expenditures, whether by groups large or small. So long as "there is not subterfuge about it," Senator Pastore had declared, "the people are entitled to act as they will." *Id.* When Congress wanted to limit independent expenditures,

it knew how to do so. It had no difficulty making its intention clear in section 608(e)(1). There is no reason to believe that if it intended that section 9012(f) apply to independent expenditures, Congress would have crafted that section in such an odd and indirect way.

In 1976, when Congress amended FECA to conform to this Court's ruling in *Buckley*, it was clear that those who spoke on the amendments understood what that case meant with respect to independent expenditures.[24] Knowing that it could not regulate independent expenditures, Congress instead imposed limits on the amount that an individual could contribute to an independent committee, 2 U.S.C. § 441a(a)(1)(c); and the amount one committee could contribute to another, 2 U.S.C. § 441a(2)(c). In addition, increased disclosure requirements were imposed on political committees that made independent expenditures, 2 U.S.C. § 434(b)(4)(H)(iii) (1976) (amended 1979), and specific disclaimers of candidate authorization were required on independent political advertising that expresly advocated the election or defeat of a clearly identified candidate. 2 U.S.C. § 441d. No one mentioned section 9012(f) because no one in Congress believed that it applied to independent expenditures.[25]

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[24] *See, e.g.*, 122 Cong. Rec. 7,186 (1976) (remarks of Sen. Buckley) ("the practical consensus of [the *Buckley*] decision is that we are going to see more and more well-organized, well-financed groups operating outside of an individual campaign, parallel to it, but independently"); *Id.* at 7,187 (remarks of Sen. Cannon) (a total ban on contributions by political committees to candidates would still leave committees free to "make their own independent expenditures"); *Id.* at 12,199 (remarks of Rep. Hays) (*Buckley* held that a limit on independent expenditures "impermissibly intruded on the right of individuals and groups to use their resources to state their own views on political matters"); H.R. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976). *See also* recitation of post-1976 congressional debate contained in Advisory Opinion ("AO") 1983-10/11, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5716 (dissenting opinion of Commissioner Aikens) at 10,975-3.

[25] Until 1980, when it intervened in *Common Cause v. Schmitt*, not many at the FEC believed that section 9012(f) applied to in-

II. ABSENT A SHOWING THAT THEY CORRUPT OR APPEAR TO CORRUPT, INDEPENDENT EXPENDITURES CANNOT CONSTITUTIONALLY BE RESTRICTED

Appellants, of course, contend that section 9012(f) applies to independent expenditures by groups like NCPAC and FCM. But if it does, then appellants must contend with *Buckley*, and they have tried hard to avoid that holding. Two separate three-judge courts have held unanimously that *Buckley* invalidates section 9012(f). Yet still appellants twist and turn, trying to distinguish

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dependent expenditures. *See* letter of October 8, 1976, from FEC Assistant General Counsel N. Bradley Litchfield to Donald Cox, Esq. (included at Appendix A to this Brief); *see also* AO 1983-10/11, *supra* at 10,975-3 & 4. In 1976, the FEC had proposed a regulation that followed the language of section 9012(f). *See* 41 Fed. Reg. 26,394. But after hearings on that proposal (at which two Commissioners and the FEC General Counsel volunteered that section 9012(f) could not be applied to independent expenditures) the regulation was withdrawn. *See Hearings on Part 140 (General Election Financing) Before The Federal Election Commission* at 21-22, 36-40. As a result of that hearing, the FEC replaced the proposed regulation with one that dealt exclusively with limits on *coordinated* expenditures by party committees in connection with a presidential general election. 11 C.F.R. § 146.1 (repealed 1980). It was not until July 1983, after these lawsuits were in the district court, that the FEC finally promulgated a regulation under section 9012(f) that tracks the language of that statute. *See* 11 C.F.R. § 9012.6.

When the election laws were amended in 1974, and later years, section 9012(f) was a derelict, lost in the Fund Act until it was resurrected in *Common Cause v. Schmitt*. It is true that section 9012(f) would be redundant if it is construed, as we urge, to apply only to coordinated expenditures, because such expenditures are treated as contributions and are regulated in FECA. 2 U.S.C. § 441a(a)(7)(B)(i). But at the time section 9012(f) and the Fund Act were passed in 1971, the coordinated expenditure/contribution provision of FECA did not exist; it was not passed into law until 1974 (in an earlier version) and until 1976 (in its current form). 18 U.S.C. § 608(e)(2)(B) (repealed 1976). No other provision limiting coordinated expenditures existed prior to that time.

this independent expenditure limitation from the one struck down in *Buckley*; trying to prove that the challenged expenditures somehow corrupt; and arguing that because it is just too hard to prove coordination, the statute should be upheld (and, by implication, *Buckley* should be ignored) in order to safeguard the integrity of the public financing scheme of the Fund Act.

A. The Holding of *Buckley*

Because *Buckley* is central to the fate of section 9012(f), we briefly review what that case held, and why. In *Buckley*, this Court drew a constitutional distinction between political contributions and expenditures. Limitations on contributions were constitutionally sanctioned; similar limitations on expenditures were not. The Court held that contribution limitations were a constitutionally appropriate means of combating the appearance or fact of improper influence stemming from the dependence of candidates on large campaign contributions. The ceilings imposed therefore served a compelling governmental interest in safeguarding the integrity of the electoral process without directly impinging on the rights of citizens to engage in political debate and discussion. 424 U.S. at 21-35.

Independent expenditures, however, were different. The governmental interest in preventing the appearance or reality of corruption was simply insufficient to justify the ceiling on independent expenditures contained in section 608(e)(1) of FECA. First, the Court equated the expenditure of money in the political arena to speech. *Id.* at 19. Then it held that independent expenditures were entitled to greater—indeed, almost absolute—protection under the First Amendment. The Court explained why that was so:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. *The absence of prearrangement and coordination of*

> *an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.* Rather than preventing circumvention of the contribution limitations, section 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

Id. at 47. (emphasis added)

The Court considered expenditure restrictions to be "substantial rather than merely theoretical restraints on the quantity and diversity of political speech," which would "exclude all citizens and groups . . . from any significant use of the most effective modes of communication."[26] *Id.* at 19-20. Similarly, the Court noted that a primary effect of expenditure limitations was "to restrict the quantity of campaign speech by individuals [and] groups. . . ." *Id.* at 39. The Court reiterated the point in *Citizens Against Rent Control v. City of Berkeley*, noting that "limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue. . . ." 454 U.S. at 299. A campaign expenditure limitation like section 9012(f) is therefore sustainable only if "the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45. That "exacting scrutiny" requires that, because statutes which regulate political advocacy "are wholly at odds with the guarantees of the First Amend-

[26] The Court noted the high cost—almost $7,000—of advertising in a major metropolitan newspaper. 424 U.S. at 20 n.20. That cost has continued to climb. A similar advertisement now costs more than $23,000 per day. Affidavit of Thomas N. Edmonds, J.A. at 66-67, incorporated by reference in Jt. Stip. 196; J.A. at 56. And that is just the beginning. To be effective, such advertisements would have to be run, again and again, over a period of time.

ment," *id.* at 50, such provisions must (1) serve a compelling governmental interest; (2) do so narrowly; and (3) constitute the legislative alternative least restrictive of First Amendment liberties.

The interests advanced in support of the independent expenditure limitation in *Buckley*—preventing real or apparent corruption; equalizing the relative ability of individuals and groups to influence elections; and restraining the rising cost of elections—were rejected by the Court as insufficient to sustain the expenditure limitation of section 608(e)(1). 424 U.S. at 47, 48, 57. The Court held that the last two could never sustain a restriction on independent political expression. Only the first justification—avoiding real or apparent corruption—might save a limitation on independent expenditures, *id.* at 26; and then only if there were a real showing of such corruption. *Id.* at 45-46. But the Court found no such evidence in *Buckley*, and so it invalidated section 608(e)(1).

Appellants have taken the Court's observation in *Buckley* that "independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption," 424 U.S. at 46, as an invitation to try again to show corruption. But this time, appellants have fashioned a notion of corruption so broad that a ride on the Senate train under Capitol Hill can be construed as evidence of the sort of corruption meant to be stamped out by section 9012(f).

B. As Was True in 1976, There Is No Evidence That Independent Expenditures Corrupt or Appear to Corrupt

Appellants have tried to show political favors flowing from past independent expenditures. Their evidence of what the district court called "patronage appointments"—and they are exhaustively set out in its opinion, J.S.

App. 69a-71a[27]—did not alarm the court, which considered them to be "in the mainstream of American political tradition." *Id.* at 71a. It states the obvious to say that a successful candidate will appoint to positions around him those with whom he is politically comfortable. But the court said it anyway, perhaps because apellants seem to believe so fervently that political appointments for one's supporters are tantamount to corruption. So long as they were competent, the court held—and appellants did not claim otherwise—"there is nothing even remotely resembling corruption involved." *Id.* at 72a. So, too, with the meetings between some of NCPAC's contributors and certain administration officials; there was no evidence that any inside information was given out at these meetings or that contributors benefited from those meetings in any way other than to have their egos inflated. The meetings were little more than a chance to "grip and grin" with administration officials, the court held. *Id.* at 73a.

Appellants do not use the word "corruption" in the sense that it was used by this Court in *Buckley*. There, the Court likened corruption to "real or imagined coercive influence," 424 U.S. at 25, "improper influence," *id.* at 29, or "improper commitments." *Id.* at 47. In 1976 and 1980, the presidential candidates received public funding, and there is every indication that they will choose such funding again in 1984. Where a candidate receives large grants of campaign funds in a lump sum at the outset of a campaign, the likelihood that that candidate will be or appear to be improperly influenced or coerced by independent expenditure efforts on his behalf is greatly reduced. The candidate may be helped by those

[27] None of the appointees had any connection with either NCPAC or FCM. Anthony Dolan, the brother of NCPAC's Chairman, and now a presidential speechwriter, had no connection with NCPAC. In any event, it was stipulated that Dolan worked on the staff of the Reagan campaign and is a Pulitzer Prize-winner author. J.S. App. 71a; Jt. Stip. 79; J.A. at 37.

efforts, and he may appreciate them, but that is not the stuff of corruption, as this Court has used the term.

Appellees made no secret of their pro-Reagan independent advocacy in 1980. Their activities were extensively reported in the press. If the voters felt that Mr. Reagan was compromised by appellees' pro-Reagan efforts, they were free to vote against him. Apparently, that was not their feeling. That is perhaps the best poll of whether independent expenditures cause "public suspicions" (FEC at 26), or whether they "erode public confidence in the integrity of the electoral process." (Common Cause Brief ("CC") at 18.)

C. Section 9012(f) Is Not Functionally Different From the Statute Struck Down in *Buckley*

According to appellants, because section 9012(f) applies only to political committees and not to individuals, that makes all the constitutional difference. The invalid provision in *Buckley*, they argue, was an "across the board" restriction on independent advocacy by "all individuals and groups." (CC at 40, quoting *Buckley*, 424 U.S. at 40.) Appellants claim that this statute can be saved because it applies only to "a very narrow class of entities—political committees." (CC at 40.)

In *Buckley* the Court noted the strangling effect of section 608(e)(1) on independent expenditures by "individuals and *groups*." 424 U.S. at 39 (emphasis added). The Court referred to expenditure limitations as restricting "the quantity of campaign speech by individuals, *groups*, and candidates." *Id.* (emphasis added). Nowhere does the opinion in *Buckley* suggest that if section 608(e)(1) had been less inclusive in its sweep it might have been saved.[28] There is no indication that the

[28] Over and over, the Court expressed dismay at the effect of expenditure limitations on "groups" (at 19), "associations" (at 79), "all groups" (at 40) and, most tellingly, their effect on "people —individually as citizen and candidates and collectively as associations and *political committees*." 424 U.S. at 57 (emphasis added).

Court's holding as to independent expenditure limitations turned on their impact solely on individuals."

It could not turn on that distinction, for it makes no constitutional difference whether citizens engage in independent advocacy singly or in groups. "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777. Whether or not speech is protected and whether it can be regulated depends on the reasons asserted to justify its regulation. It does not depend on the identity of the speaker. Indeed, *Buckley* upheld restrictions on contributions precisely *because* alternative avenues of independent expression were available to individuals and groups, the Court recognizing that political advocacy could be given its strongest and most effective voice in groups. 424 U.S. at 15. *See Republican National Committee* v. *FEC*, 487 F. Supp. at 286.

Moreover, there is no assurance that, in the hands of the FEC, section 9012(f) will not be used against individual speech, for the FEC's Advisory Opinions on who is and is not a political committee are not comforting on that score.[29]

D. Section 9012(f) Cannot Be Upheld As a Prophylactic Measure

Because they cannot show that independent expenditures corrupt, or even appear to corrupt, appellants have styled section 9012(f) as a "prophylactic" measure,

[29] Any doubt on that score was surely dispelled by this Court's description of *Buckley* in *California Medical Association* v. *FEC*. The Court described *Buckley* as striking down expenditure limitations because "they directly restrained the rights of citizens, candidates and *associations* to engage in protected political speech." 453 U.S. at 194 (emphasis added).

[30] *See* III A, *infra* pp. 37-38.

somehow needed to maintain the integrity of the Fund Act. The simple answer to appellants' "prophylactic" argument is that there is little evidence that Congress intended section 9012(f) to be a prophylatic directed at groups like NCPAC and FCM. If section 9012(f) has an intended prophylactic effect, it is aimed at *candidates*, not their independent supporters. As we have already shown above, that section was aimed at preventing candidates who accept public funding from exceeding the amount of the public grant by accepting additional contributions in the form of coordinated expenditures. In that context, section 9012(f) made sense at the time it was passed. It was intended to force a candidate who accepted public financing to operate the campaign on the public grant alone, not to curtail the independent activities of the candidate's supporters. So long as there is no subterfuge about it, Senator Pastore had declared, "the people are free to do as they will." 117 Cong. Rec. 42,626.

By contending that section 9012(f) is a prophylactic measure, appellants believe they have found a way to uphold that section even though it is indefensible on its own merits; for in another case involving a prophylactic statute, this Court said that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *FEC* v. *National Right to Work Committee* ("*NRWC*"), 103 S.Ct. at 560. That decision, appellants urge, is the key to this case. The Democratic Party goes so far as to say that *NRWC* "controls this case." (Dem. at 24.)

Contrary to appellants' assertions, however, *NRWC* does not decide this case; it does not qualify or overrule *Buckley*; and it does not jettison the principle that statutes curtailing First Amendment freedoms are subject to strict scrutiny. Because appellants stake so much on *NRWC* and what they see as its rule of judicial abstention when fear of corruption is claimed as the justi-

fication for a statute, we turn to *NRWC* and what the Court held in that case.

1. NRWC *Is Another in a Line of Cases That Upholds Congressional Regulation of Corporate and Union Contributions Activity in Federal Elections*

In *NRWC*, the Court upheld a statute which prohibited corporations from soliciting, other than from certain persons, contributions to a corporate PAC to be used for political purposes. 2 U.S.C. § 441b(b)(4)(C). In the case of a corporation without capital stock, like National Right to Work Committee ("NRWC"), the law permitted solicitation from the corporation's "members." Because it did not have any formal members, NRWC claimed that it was entitled to solicit funds for its PAC from members of the general public, for these were its members. If not, NRWC claimed, the challenged provision violated its First Amendment rights.

The Court held that the general public from whom NRWC had solicited contributions were not its "members," and that section 441b(b)(4)(C) was not unconstitutional. The Court examined and weighed the asserted justifications for the statute and found them "constitutionally sufficient," although it relied on only one of them. The Court held that the statute could be justified as a legitimate safeguard against the possibility that "substantial aggregations of wealth amassed by the special advantages which go with the corporate form" might be converted into political "war chests" which could be used to incur "political debts" from legislators aided by contributions. 103 S.Ct. at 559. Congress chose to address this danger by restricting the permitted universe of potential contributors from whom corporations could solicit funds.

When this Court in *NRWC* stated that it would not "second-guess a legislative determination as to the need for prophylactic measures," *id.* at 560, it was not refusing to examine the Congressional determination that past corporate abuses justified the restrictions on corporate political activity. In fact, the Court did just that when it reviewed the history of the movement in Congress to regulate corporate participation in federal elections based on past demonstrated abuses, and concluded that Congress had, through the years, made a "careful legislative adjustment of the federal electoral laws to meet that danger." The congressional findings, the Court held, reflected a "permissible assessment of the dangers posed by [corporations and labor unions] to the electoral process." *Id.*

The "legislative determination" that the Court declined to "second-guess" was the decision by Congress to legislate as to *all* corporations and unions, whether or not they posed any real threat of easy accumulation of large political funds. Put another way, once it was clear that Congress had correctly found a danger, the Court would not engage in "excessive fine-tuning" of the manner in which Congress chose to deal with that danger. J.S. App. 60a n.36. Even so, the Court satisfied itself that the means chosen were "sufficiently tailored . . . to avoid undue restrictions on . . . associational interests." 103 S.Ct. at 560.

The Court in *NRWC* did *not* establish the rule that Congress's wish is this Court's command where corruption is the evil feared. This Court should not turn a blind eye to First Amendment restrictions upon the mere assertion that legislation is aimed at curtailing corruption. *NRWC* established the proposition that *if* it could be demonstrated that independent expenditures corrupted or appeared to corrupt, *then* the Court would not "second-guess" a restriction like section 9012(f) that appears to regulate expenditures of *all* political committees, even if some of those committees posed no threat at all. *NRWC* teaches that ideological groups that organize themselves as corporations are not necessarily immune

from statutes that govern corporations generally.[32] That case does not mean that a claim of a fear of corruption is the beginning and end of constitutional analysis. Moreover, we have already shown that section 9012(f) is not aimed at independent expenditures and that, in any event, there is still no evidence that such expenditures corrupt. Where, as here, Congress has made no "legislative determination as to the need for prophylactic measures" aimed at independent groups, the Court is not "second-guessing" Congress when it independently scrutinizes a provision, like section 9012(f), that operates so directly in a constitutionally sensitive area.

The statute in *NRWC* is different from section 9012(f) in both its operation and its effect. Section 441b(b)(4)(C) is a statute limiting the permissible universe of solicitations by corporations and unions for their PACs because of a concern that funds amassed by those groups might be used to incur "political debts" through "large financial contributions" to candidates.[33] That is not what this case involves. Section 9012(f) regulates *expenditures*, and not just by corporations. It applies to groups —associations, committees or organizations—"whether or not incorporated." 26 U.S.C. § 9002(9). *Buckley* made

[32] *But see* 11 C.F.R. § 114.12(a) (1984) (political committees organized as corporations are not subject to the corporate contribution and expenditure limitations of FECA). Under the FEC's regulation, NRWC would have been exempt from the limitations of section 441b(b)(4)(C) if it had been registered with the FEC as a political committee. The FEC, whose regulation exempts appellees from the statute upheld in *NRWC*, cannot lift the language and rationale of that case and apply it here to save a statute that applies only to political committees, but not to groups like NRWC.

[33] Appellants note that section 441b(a) restricts corporate expenditures along with corporate campaign contributions. (CC at 22 n.72.) *NRWC did not*, however, sustain the solicitation restrictions of section 441b(b)(4)(C) because that section supported the expenditure limitations contained elsewhere in the statute; rather, it was because the limitation on those who could be solicited helped safeguard against abuses stemming from contributions.

clear that although Congress could legislate as to financial contributions made directly to candidates, it must legislate more carefully when it comes to independent expenditures because of their "substantially diminished potential for abuse." 424 U.S. at 47.[34]

2. *If Section 9012(f) Is a Prophylactic Provision Aimed at Independent Expenditures, It Is Constitutionally Infirm*

Appellants' "prophylactic" argument was tried without success in *Buckley*. There, appellants tried to save section 608(e)(1) on the theory that it was a "loophole-closing provision," necessary to prevent circumvention of other portions of FECA. The Court found the statute vague, narrowed it to cure that problem, and then found that, as narrowed, it was ineffective to serve its proffered purpose.

The same analysis undoes section 9012(f). Appellants' claim that it leaves individuals, "acting alone or in informal groups" (CC at 4), free to engage in unlimited advocacy is what makes section 9012(f) ineffective as a prophylactic. For example, in 1980, ten individuals alone spent more than $1 million on independent expenditures; one of them spent almost $560,000.[35] Jt. Stip. 167; J.A. at 52. Fifty-one individuals spent more than $1.7 million. Jt. Stip. 167; J.A. at 52. Compare those figures with the $1.8 million spent by NCPAC in support of Mr.

[34] The other asserted justification for the statute in *NRWC* was that it was part of a statutory scheme designed to protect shareholders and those who pay union dues from use of their money against their wishes for political purposes. 103 S.Ct. at 559. This was not relied on by the Court in sustaining section 441b(b)(4)(C) because NRWC was a corporation without capital stock, just as NCPAC and FCF have no shareholders. That problem therefore does not exist with respect to appellees here, and it could not be used to regulate appellees' independent activities.

[35] Stewart Mott, who earned his own footnote in *Buckley* as a big spender, 424 U.S. at 37 n.42, spent more than $110,000 during the 1979-80 election cycle. Jt. Stip. 167; J.A. at 52.

Reagan in the 1979-80 election cycle and the Court will see that section 9012(f), like section 608(e)(1) before it, "prevents only some large expenditures." *Buckley*, 424 U.S. at 45. The effect of section 9012(f) is to permit wealthy individuals to spend as much as they wish, and to prevent persons of modest means from joining together effectively to make themselves heard."

III. SECTION 9012(f) IS UNCONSTITUTIONAL ON ITS FACE

A. Section 9012(f) Is Overbroad

In addition to finding that section 9012(f) could not pass muster under *Buckley*, the district court found that provision to be fatally overbroad.

Last term, this Court noted that the overbreadth doctrine has been used to describe "a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State v. Munson*, 104 S.Ct. 2839,

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[20] If section 9012(f) is upheld, persons of ordinary means will not have available to them effective ways to make themselves heard through the print and broadcast media. The newspapers touted by appellants like the *Hamilton-Standard Speaker*, the *Lancaster Journal* and the *Easton Star-Democrat* (Dem. at 19) are not widely read outside of their immediate areas of publication. The smaller radio stations suffer the same shortcoming, and even those, like their print counterparts, are expensive if a citizen wants to advertise more than a few times.

The fact is that to be heard, to speak out effectively, requires access to large metropolitan newspapers and to the networks. That is where the campaign is reported and where opinions are formed and swayed. If appellants have their way, those media outlets will be foreclosed to ordinary citizens, and their speech will be relegated to newspapers read by comparatively few citizens. "[A] restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Members of City Council v. Vincent*, 104 S.Ct. 2118, 2133 (1984), and the cases cited therein.

2852 n.13 (1984). Section 9012(f) is just such a statute. There is nothing "narrowly tailored" about it. The statute all but outlaws independent expenditures by political committees, and as we show below, in the FEC's view, wherever two or more are gathered, a political committee is born. Section 9012(f) therefore practically does away with independent expenditures. Moreover, because that section restricts *only* protected activity, its overbreadth is more than substantial; it is total. Nor is this a case where "conduct and not merely speech is involved." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Only speech is involved here. *Buckley*, 424 U.S. at 19.

Just as in *Munson*, "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." 104 S.Ct. at 2852. After *Buckley*, independent expenditures are not to be proscribed at all, except on a showing of real or apparent corruption resulting from those expenditures. In addition, where a statute regulates protected conduct not only of those parties before the court, but of others as well, a facial challenge on overbreadth grounds is justified. There are others who are not before this Court, but who are at risk under the statute. Because of the FEC's breathtaking interpretation of who is a political committee, this Court need not engage in "[m]usings as to possible applications of [the] statute to third parties." *Munson*, 104 S.Ct. at 2858 (Burger, C.J., dissenting).

Section 9012(f) addresses expenditures by "political committees," a term that, in the hands of the FEC, has been interpreted to apply to any joint election-related activity. For instance, in AO 1976-51, 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5215, the FEC ruled that an informal discussion group that discussed general foreign policy was considered a "political committee." In its request for a written opinion from the FEC, the group indicated that its general expenses might exceed $1,000 in a calendar

year, and that there was a possibility that contributions in the form of checks from individual members of the informal discussion group to a particular candidate might be collected by one member of the group and delivered to a candidate who may have been "the subject of discussion" among the individuals of the group. According to the FEC, this informal discussion group, which made an *ad hoc* collection of contributions, was a political committee.[36]

In AO 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5247, the Commission ruled that a group that purchased an advertisement in The New York Times was a political committee if the cost of the advertisement exceeded $1,000 and the "basic thrust" of the advertisement was to seek an *unidentified* alternative candidate to President Carter.

Even an individual has been found by the FEC to be a political committee. In AO 1980-126, 1 Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5577, the FEC held that where several individuals jointly purchased a message of election advocacy, and one of the individuals collected the money to pay for that message, *that individual* became a political committee. According to the FEC, this was because the purchase "[did] not involve the joint purchase by several individuals (each paying their respective shares of the purchase price directly to the vendor from personal funds) of . . . a message of election advocacy." *Id.* at 10,713.[37]

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[36] This Advisory Opinion, and the others discussed herein, construed the term "political committee" as defined under FECA 2 U.S.C. § 431(4)(A). The FECA and Fund Act definitions are similar, and in its regulations promulgated under the Fund Act, the FEC has adopted the FECA definition of "political committee," making clear that, in its view, the coverage of FECA and the Fund Act are identical. *See* 11 C.F.R. §§ 100.5, 9002.9. The FEC has even said so itself. (FEC at 21 n.20)

[37] The FEC has cited a number of Advisory Opinions (FEC at 32 n.22) which it apparently believes protect section 9012(f) against

The breadth and arbitrariness of the FEC's decision as to who is and is not a political committee, and the subtle distinctions upon which those decisions turn make section 9012(f) an uncertain and dangerous warning to those who would engage in protected speech.[38] The sweep of those opinions makes the statute's overbreadth not only real, but substantial as well. That alone was reason enough for the district court to strike down the statute on overbreadth grounds. But because section 9012(f) is also a criminal statute, the overbreadth doctrine has even more urgent application in this case.

B. Section 9012(f) Cannot Be Narrowed in Any Principled Way

The district court tried without success to save section 9012(f) by narrowing its broad reach in a manner consistent with its terms and apparent congressional intent. The court correctly identified the difficulties inherent in the Democratic Party's argument that section 9012(f) could be saved by narrowing it to apply only to groups whose contributors do not retain some sort of "control" over how their contributions are spent. The court noted, first, that there was no indication anywhere that Congress intended such a limited application of section 9012(f); and, second, that such a limitation itself created

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fatal overbreadth. Those Opinions prove too much, for all of the cited Opinions involve instances in which the FEC has found a group *to be* a political committee.

[38] For the FEC, whether a group is a political committee depends on whether the group spends the funds of just its members, or whether it spends money "beyond the personal funds of the organizer or organizers" of the group. FEC at 32 n.22. But in the face of a suggestion "that the First Amendment affords less protection to ideas that are not the product of 'individual choice'," the Court has observed that "no decision of this Court lends support to such a restrictive notion." *First National Bank of Boston v. Bellotti*, 435 U.S. at 783 n.19.

vagueness problems since not even counsel could define "control" with any precision.[39] J.S. App. 87a-90a.

Moreover, the Democrats' strained attempts to narrow the reach of section 9012(f) by tethering it to a definition of "control" only demonstrates its overbreadth. *Id.* at 87a-88a.[40] Appellants in this case, and those in the 1980 round of litigation over this statute, have struggled with just who is and is not covered by section 9012(f). In the earlier cases, Common Cause idealized groups exempt from the statute as consisting of "two or more individuals, pooling and using their own money to engage jointly in personal expression." *Common Cause* v. *Schmitt*, No. 80-847, CC at 35. For the FEC, they were "informal groups." *Id.* FEC Jurisdictional Statement at 19. This year, Common Cause says the statute does not apply to individuals "acting alone or in informal groups." (CC at 4.) The FEC refers to those outside the scope of section 9012(f) as "groups of individuals . . . engaging in joint political expression." (FEC at 34.)

[39] Section 9012(f) has another vagueness problem. The statute regulates expenditures made "to further the election" of a publicly financed candidate if those expenditures would constitute "qualified campaign expenses" if incurred by the candidate. The term "qualified campaign expense" is defined as an expense incurred "to further" the election of a candidate. 26 U.S.C. §9002(11). That circular definition confuses rather than informs, and only begs the question of what expenses are regulated under section 9012(f). The term "to further the election" is nowhere defined in FECA or the Fund Act.

Almost any expenditure can be said "to further" a candidate's election. In *Buckley*, the Court observed that the distinction between discussions of issues and candidate advocacy "may often dissolve in practical application." 424 U.S. at 42. The possibility that section 608(e)(1) might restrict ideas led the Court to narrow that section in an effort to save it. Similarly, section 9012(f) could also operate to restrict the expression of ideas. It could be narrowed, but even so, individuals would still escape its reach. Moreover, the more it is narrowed, the less it would serve the "prophylactic" purpose that appellants have fashioned for it.

[40] The statute's overbreadth is further shown by Common Cause's argument that the right to request an Advisory Opinion from the FEC on whether an individual or group is a political committee somehow dissipates the potential chill on protected First Amendment rights. (CC at 48). First, the FEC's views on who is a political committee are not comforting. Second, there is no reason why a person or group who wishes to make independent expenditures should first have to ask the FEC whether that activity may provoke civil and criminal penalties.

The size of the group or whether it is formal or informal should not determine whether the speech of its members is constitutionally protected. Nor should its structure matter, whether its directors are elected by others (FEC at 33), or whether a group casts the message of its contributors in a professional or amateurish way. (Dem. at 16.) What should matter, and what this Court has said is all that matters, is whether the speech of those many contributors corrupts or appears to corrupt. As we have shown below, independent expenditures not only do not corrupt in fact, there is no evidence that they even appear to corrupt.

IV. IF SECTION 9012(f) IS UPHELD, THE ONLY EFFECTIVE MEANS OF POLITICAL EXPRESSION IN PRESIDENTIAL ELECTIONS WILL BE FORECLOSED TO MOST CITIZENS

Appellants' expansive notions of the reach of section 9012(f)—and their correspondingly narrow view of the First Amendment—would lead this Court effectively to outlaw independent political expression for all but the wealthy; and please recall that it was against the real or imagined influence of wealth that the Fund Act was intended to protect presidential politics. Yet if appellants' view of section 9012(f) is adopted by this court, the wealthy will be alone in the field of independent expenditures in presidential campaigns. Other than the voices of the candidates themselves and the political parties, only the voices of those who can afford the high cost of independent advocacy will be heard. Although

"the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," *Buckley*, 424 U.S. at 48-49, that is just what section 9012(f) does.

In *Buckley*, the Court upheld contribution limitations partly because there was, according to the Court, no indication that such limitations "would have any dramatic adverse effect on the funding of campaign and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and *political committees* to raise funds from a greater number of persons." 424 U.S. at 21-22 (emphasis added). That is just what NCPAC and FCM have done over the years by raising funds from hundreds of thousands of people.[41]

Now appellants want to narrow the field of independent expenditures, ending the activities of long-standing committees like NCPAC and FCM, which have given strong and apparently effective voice over the years to the views of their contributors on issues of importance to them. Independent expenditures must be—or they must appear to contributors to be—an effective means of self-expression, since groups like NCPAC and FCM have been so successful in raising funds. Moreover, if such groups were not effective, appellants would not so ardently wish to have them suppressed. Appellants complain that groups like NCPAC and FCM are "well-financed [and] professionally run," assisted by "speechwriters, public relations and advertising specialists, and media experts." (CC at 8, 10.) Worse, they are "directly and visibly helpful to presidential candidates" (*id.* at 12), "substantially advanc[ing] the candidate's chances of election." (FEC at 26.) As a consequence, as the district court noted, appellees' expenditures "probably [do] exactly what they claim: help the man they support. That may be why so many give." J.S. App. 78a.[42]

In any event, as this Court has noted, "the fact that advocacy may persuade the electorate is hardly a reason to suppress it." *Bellotti*, 435 U.S. at 790. We recognize that a range of individual "grass roots" and volunteer activities would still be available to individuals if section 9012(f) is upheld. But such means of expression are not nearly as effective as the right of thousands of citizens to pool thier small donations to avail themselves of "expensive modes of communication [which are] indispensable instruments of effective political speech." *Buckley*, 424 U.S. at 20.

If section 9012(f) is upheld, politically significant campaign advocacy will have to be conducted through one of these six authorized channels:

(1) Activities funded by a national campaign committee, subject to its discretion and the expenditure limits imposed by 2 U.S.C. § 441a(b).

(2) Use of campaign materials purchased by a local party committee, or voter registration and get-out-the-vote activities conducted by such committees. 2 U.S.C. § 431(9)(B)(viii), (ix). These activities are also subject to the discretion of local officials and their access to funds.

(3) Partisan communications by a labor organization to its members or their families. Unions are

[41] *See supra* note 12.

[42] The district court in *Common Cause v. Schmitt* put it just as well:

> That the language and format employed in the groups' public political communications have a professional touch does not make it any less the language of the individual contributor; one of the things he or she must waste is the professional touch to make his or her speech efficient or effective in the modern age.

512 F. Supp. at 497.

free to use treasury funds *without limit* for these purposes. 2 U.S.C. §§ 431(9)(B)(v), 441b(b); 26 U.S.C. § 9012(f)(2)(B). The record in *Republican National Committee v. FEC* showed that the AFL-CIO, the Machinists Union and the United Auto Workers together spent more than $4.9 million on partisan political activity in 1976. 487 F. Supp. at 305-306 (Joint Findings of Fact). *See also* the endorsement of Walter Mondale by the AFL-CIO and its open efforts on his behalf.

(4) Partisan communications by a corporation to its shareholders, executives or administrative personnel, or their families. 2 U.S.C. §§ 431(9)(B)(v), 441b(b). These may be funded by general corporate funds without limit.

(5) Wealthy individuals may make independent expenditures without limit. 26 U.S.C. § 9012(f).

(6) Newspapers, broadcasters, periodicals and certain nonprofit organizations may engage in independent expenditures. 26 U.S.C. § 9012(f)(2).[42]

All other significant activities would be either prohibited as being in coordination, or they would be subject to the strictures of section 9012(f). Of course, individuals could still knock on doors for their candidate, or put campaign signs in their front yards. But surely not even appellants would suggest that those activities are the effective equivalent of permitting citizens to pool their funds to amplify their voices so that their views

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[42] Whether the statute's exemption of the press and broadcast media from the operation of section 9012(f) is constitutionally permissible is an open question. The Court has recognized in a variety of contexts that the media do not occupy a special place under the Bill of Rights. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 681-91 (1972); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Zurcher v. Stanford Daily*, 436 U.S. 547, 565-66 (1978); *Calder v. Jones*, 104 S.Ct. 1482, 1487-88 (1984).

can be heard on national issues in a presidential election."[43]

There is no good reason why they should not be permitted to do so. Their opinions are not a threat to society; they are simply expressed outside the mainstream of the two major political parties. There is no constitutional reason why section 9012(f) should be allowed to limit the independent speech of a political committee and its contributors simply because that speech is paid for by a committee with funds collected from its contributors. The fact that an expenditure is involved does not make it any the less protected speech."[44]

Without section 9012(f), the six remaining alternatives constitute censorship in all but name, for most Americans do not own a newspaper, do not have sufficient wealth to fund independent expenditures, or sufficient power to affect corporate acts, or to influence labor unions. Their only alternative under the law, therefore, is to hope that party officials will provide a means of political involvement. Subjecting the vast majority of citizens to the will of these officials is to condition their speech upon the approval of its content by another.

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[43] It is difficult to take seriously the FEC's suggestion that the $1.00 tax checkoff system is a sufficiently important means of political participation by voters to justify the expenditure limitation of section 9012(f). (FEC at 35-36) Most Americans have passed up this opportunity that means so much to the FEC. For example, in 1981, 48.2% of the taxpayers checked "no" to the question whether they wanted $1.00 of their taxes earmarked for the Presidential Election Campaign Fund; only 26.1% checked "yes," down from a figure of 29% in 1977, the first year of the Fund. Jt. Stip. 200; J.A. at 57.

[44] "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16.

Apart from whether national or local party organizations have sufficient resources to share with citizens or groups they favor, such organizations will support only those groups whose activities and messages are consistent with those of the party. No party committee will be willing to fund individuals and groups to do or say whatever they please. Political parties try to avoid hard ideological stances and tend to shade positions on controversial issues in order to appeal to the widest possible range of voters. The professional politician and the ideologue are constantly at odds over campaign tactics. Making the latter's right to speak conditional upon the approval of the former is censorship, plain and simple.

The political parties have not always expressed the will of the American people. One commentator has observed that five of the most significant movements of the last 20 years—the civil rights movement, the Vietnam peace movement, the political reform movement, the women's rights movement and, most recently, the movement toward fiscal restraint—originated in the private sector, not in the political parties.[46] Those movements could not have taken place if like-minded citizens had been prevented from joining their voices together to enhance their political power.

That is just what section 9012(f) prevents, and it should be struck down for that reason.

CONCLUSION

It is the decision by a candidate to accept public campaign financing that subjects that candidate to the Fund Act's restrictions on private campaign funding and the reporting and other requirements of the Act. That, of course, is the candidate's choice. In exchange for public financing, the candidate must surrender the prerogative

[46] Alexander, *The Case for PACs*, *supra*.

of private contributions. But a candidate's decision to receive public monies cannot prevent citizens from expressing themselves independently of that candidate. They are still free to speak out singly and (but for section 9012(f)) in groups. Indeed, *Republican National Committee v. FEC* addressed that very point. A candidate's decision to accept public funding does not abridge the right of that candidate's supporters to contribute because "uncoordinated expenditures are permitted without limit." 487 F. Supp. at 286. Appellants would now have this Court undo one more right of private citizens—the right to band together to express themselves effectively on the merits of a publicly-funded presidential candidate, independently of the candidate, and outside the political parties. There is no reason why the Court should do that, and every reason why it should not. The court below said it well:

> The defendants in these actions have identified the critical vice of section 9012(f): were it not repugnant to the Constitution, it would give the institutionalized political parties an almost impervious monopoly over the agenda and terms of debate in presidential electoral campaigns. Were we to give our blessing to the law examined in these actions, we would be permitting only those few with control over our major political parties, our institutional press, or with vast individual resources, to capture the economies of scale inherent in our national society and thus to be heard above the din of everyday existence. Where the threat of corruption is so minimal, we cannot so abnegate our responsibilities.

J.S. App. 99a.

There is nothing supporting section 9012(f) except appellants' fanciful concerns and assumptions. The Court should find: (a) that section 9012(f) simply does not regulate expenditures like those at issue here, or; (b) if

it down, the Court should strike it down as being contrary to the First Amendment.

Respectfully submitted,

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August 31, 1984

APPENDIX A

Letter of Oct. 8, 1976, from Assistant General Counsel Litchfield to Donald Cox, Esq.

[FEC Logo]

FEDERAL ELECTION COMMISSION
1325 K Street N.W.
Washington, D.C. 20463

8 Oct. 1976

Donald Cox
Lynch, Sherman, Cox & Fowler
Spite 414 Marion E. Taylor Bldg.
Louisville, Kentucky 40202

Dear Mr. Cox:

This responds to your letter of September 13, 1976, requesting confirmation of a recent telephone conversation with Paul Kamenar concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"). You ask whether an unauthorized political committee may make independent expenditures in excess of $1,000 on behalf of a presidential candidate in the general election.

Under 2 U.S.C. § 431(p) and § 109.1(a) of the Commission's proposed regulations, the term "independent expenditure" is defined as

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate and which is not made in concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate.

Some members of the Commission have voiced doubts concerning the constitutionality of 26 U.S.C. § 9012(f), and the Commission has taken the position that this section does not apply to independent expenditures. See Part 109 of the proposed regulations. Section 110.7(b)(5)

of the proposed regulations is based, in part, on 26 U.S.C. § 9012(f).

For your further information I am enclosing copies of the Commission's response to AOR 1976-20 and a policy statement setting forth the contribution limits that apply to persons who make contributions to a committee making independent expenditures. This response is for informational purposes only. I hope it is helpful for purposes of your inquiry.

Sincerely yours,

/s/ N. Bradley Litchfield
N. BRADLEY LITCHFIELD
Assistant General Counsel

Enclosure

AMICUS CURIAE

BRIEF

Office - Supreme Court, U.S.
FILED
JUN 29 1984
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Nos. 83-1032, 83-1122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION,
Appellant,
v.
NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,
Appellees.

DEMOCRATIC PARTY OF THE UNITED STATES, *et al.*,
Appellants,
v.
NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF COMMON CAUSE AS AMICUS CURIAE

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June 29, 1984

BEST AVAILABLE COPY

QUESTIONS PRESENTED

26 U.S.C. § 9012(f)(1) imposes a dollar limit on expenditures by a political committee in support of a candidate in a presidential general election who has opted to eschew private financial support in favor of public financing. The questions are:

1. May Congress constitutionally impose that limit, where: (a) Congress has found that the limit is necessary as a prophylactic measure to eliminate actual corruption and the appearance thereof, to prevent the subversion of the function of the public financing system as an alternative, not a supplement, to private financial support, and to effectuate the ban on coordinated expenditures, and (b) the limit leaves open numerous alternative avenues of expression?

2. Should the Court uphold the constitutionality of the statutory limit as applied to the appellee political committees, as to whom there is a concrete factual record, and reserve for future cases consideration of whether the statute may be unconstitutional as applied in other instances that are now only hypothetical?

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Appellants,
v.
National Conservative Political Action Committee, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF COMMON CAUSE AS AMICUS CURIAE

INTEREST OF AMICUS

Common Cause is a nonprofit, nonpartisan membership corporation organized under the laws of the District of Columbia. It has approximately 260,000 members. Common Cause filed briefs and participated in oral argument

as an *amicus curiae* before the three-judge district court below. It also participated actively in congressional consideration of the statute at issue in this case. Common Cause has appeared before this Court in other cases concerning the constitutionality or implementation of the federal election laws, including *Common Cause v. Schmitt*, a case involving issues similar to those presented here with respect to the constitutionality of 26 U.S.C. § 9012 (f)(1).[1]

STATEMENT OF THE CASE

A. The Statutory Framework

In 1971, Congress enacted the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-13 ("Fund Act") to provide for public financing as an optional alternative to private fundraising in presidential general election campaigns.[2] Congress' objective was to improve the integrity of the electoral process, and the citizenry's confidence in that process, by giving each presidential candidate the opportunity, at his option, of avoiding the burdens and entanglements of private fundraising.

Under the Fund Act, a major-party presidential candidate may choose to finance his general election campaign with public funds.[3] To be eligible for public financing, a major-party candidate must certify to the

[1] 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by equally divided Court*, 455 U.S. 129 (1982) (as plaintiff); *see, e.g., California Medical Association v. FEC*, 453 U.S. 182 (1981) (as amicus curiae); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (as intervening defendant); *Republican National Committee v. FEC*, 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980) (as amicus curiae).

[2] The Fund Act's public financing provisions became effective on January 1, 1975. *See* 26 U.S.C. § 9013.

[3] 26 U.S.C. § 9004. A political party is a "major party" within the meaning of the Fund Act if it fielded a presidential candidate in the preceding election and the candidate received 25% or more of the total vote. 26 U.S.C. § 9002(6).

Federal Election Commission ("FEC") that he and his "authorized committees"[4] will not incur aggregate "qualified campaign expenses"[5] in excess of the amount of the public payment and will not accept private contributions to defray campaign expenses.[6] A major-party presidential candidate who so certifies receives a public stipend, which will be almost $40,000,000 in 1984.[7]

The section at issue in this case, 26 U.S.C. § 9012 (f)(1), complements these provisions and protects the integrity of the public financing alternative by regulating "political committees" that are not "authorized committees" of the publicly financed candidate—that is, political committees that collect private contributions and make expenditures to support the candidate but are not part of his official campaign. Section 9012(f)(1) allows such unauthorized political committees to spend up to $1,000 each "to further the election of" the candidate. The statute provides that:

> "[I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000."

[4] A political committee is an "authorized committee" of candidates for President and Vice President if it is "authorized in writing by each candidate to incur expenses to further the election of such candidates." 26 U.S.C. § 9002(1).

[5] "Qualified campaign expenses" include all campaign-related expenses incurred by the candidate or by his authorized committees. 26 U.S.C. § 9002(11). An expense incurred by a person authorized by the candidate (or by an authorized committee) is charged to the candidate (or the committee). *Id.*

[6] 26 U.S.C. §§ 9003(b), 9012(c)(1), (b)(1).

[7] *See* 26 U.S.C. § 9006(a); 2 U.S.C. §§ 441a(b)(1)(B), 441a(c).

Section 9012(f)(1) applies only to "political committees," and not to individuals or other groups. A "political committee" under the Fund Act is "any committee, association, or organization" that "accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election" of a candidate.[9] Section 9012(f)(1) does not reach "groups engaged purely in issue discussion."[9]

In sum, if a candidate in the presidential general election wants to eschew the burdens and entanglements of private fundraising, he may opt for public financing and receive, in 1984, almost $40,000,000. When he does so, he obligates himself not to accept private contributions or spend more than the public subvention.

The supporters of a publicly financed candidate retain many ways of helping his campaign, acting alone or in informal groups. These include making unlimited expenditures on the candidate's behalf, so long as those expenditures are independent from the candidate's campaign and are thus not subterfuge contributions.[10] And supporters may form or contribute to unauthorized political committees—groups that aggregate and spend other people's money—to make independent expenditures on behalf of a publicly financed candidate, which do not exceed $1,000. Individuals and groups, including political committees, may also spend unlimited sums on discussions of issues, provided such expenditures do not ex-

[9] 26 U.S.C. § 9002(9). *See* Argument Part III *infra*.

[9] *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

[10] The FECA defines the term "independent expenditure" as:

> "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17).

pressly advocate the election or defeat of a publicly financed presidential candidate.

B. Facts

Congress enacted public financing to protect the integrity of presidential elections. Understanding the Fund Act thus requires familiarity with the troubling experiences in the presidential elections in 1972 and previous years that led Congress to activate the Fund Act in 1973.[11] Adjudication of the issues here also should take into account the factual record of what has occurred in presidential campaigns since the Fund Act became effective: the 1976 presidential election in which both major candidates chose public financing; the 1980 presidential election in which both candidates chose public financing, but so-called "independent expenditure" committees emerged as a significant factor; and the 1984 election campaign to date

1. *Problems With Private Funding in the 1972 and Earlier Presidential Elections*

As early as 1907, President Theodore Roosevelt urged Congress to adopt a system of public financing of federal election campaigns as a means of freeing national politics of the influence and power of big money.[12] That and companion proposals were prompted in part by concern about the size and sources of campaign funds in the 1904

[11] As Justice Frankfurter said with respect to another campaign reform statute:

> "Appreciation of the circumstances that beget this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us." *United States v. UAW*, 352 U.S. 567, 570 (1957).

[12] H.R. Doc. No. 1, 60th Cong., 1st Sess., pt. 1 at XLVII (1908), *quoted in Buckley v. Valeo*, 519 F.2d 821, 836-37 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) (*per curiam*); *see also id.* App. C, at 966.

elections; this concern "crystallized popular sentiment" that "big money" bought special consideration in federal elections."[16]

By 1971, when the Fund Act was enacted, it had become all too apparent that the patchwork of limited campaign reform legislation passed by Congress over the first 70 years of the century was

> "overmatched by what proved to be wholesale circumvention, including notably the *invention and proliferation of political committees that purported to be independent* and outside the knowledge and control of the candidates and designated campaign committees. The infinite ability to multiply committees eviscerated statutory limitations on contributions and expenditures."[17]

The 1972 election and its aftermath provided compelling evidence that money continued to impeach the integrity of the electoral process. Disclosures about campaign finance abuses in the 1972 presidential election played a central role in the painful national trauma known as Watergate. The financing of the 1972 presidential campaign marked "a watershed for public confidence in the electoral system."[18]

Thus, when Congress activated the Fund Act in 1973, it had ample reason to believe that those who render significant and visible financial assistance to a presidential candidate often receive special consideration, legally or illegally; and, further, that this spectacle was inconsistent with the ideals of American democracy and was corroding public confidence in the electoral system.

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[16] *Buckley v. Valeo*, 519 F.2d at 837 (quoting *United States v. U.A.W.*, 352 U.S. at 572).

[17] *Buckley v. Valeo*, 519 F.2d at 837-38 (emphasis added).

[18] *Id.* at 840.

2. *The Public Financing Experience in the 1976 Presidential Election*

Public financing replaced private fundraising for the first time in the 1976 presidential election. Both major-party candidates elected public financing. Each received $21,800,000 and spent almost that amount.[19] In the 1976 election, "independent" political committees spent insignificant amounts to influence the presidential race.[20] There were no scandals or alleged improprieties associated with the financing of the 1976 presidential election.[21]

3. *Public Financing and the Emergence of So-Called "Independent Expenditure" Committees in the 1980 Presidential Election*

In the 1980 election, both major-party presidential candidates again opted for public financing. Each received and was entitled to spend up to $29,400,000. The official campaigns again stayed within that limit. But, unlike 1976, the 1980 election saw the emergence of political committees, including appellees here, that operated large, professionally run, purportedly "independent" campaigns on behalf of the major-party candidates.[22] Those campaigns, operated in violation of 26 U.S.C. § 9012(f)(1), seriously compromised the objectives of the Fund Act.

a. *The Corrosive Effect of Political Committee Expenditures in Presidential General Elections*

The Fund Act was prompted in part by Congress' concern that candidates might become, or appear to be, be-

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[19] *Report of the Federal Election Commission on the Presidential Election Campaign Fund* (Sept. 27, 1979).

[20] *See, e.g.*, *St. Regis*, ¶¶ 143, 151; *Rev.* 58, 54, 61, 62.

[21] *See, e.g.*, H. Alexander, *Financing Politics* 98 (2d ed. 1980).

[22] *See, e.g.*, Claude & Kimball, *The "Free Market" of Ideas, Independent Expenditures, and Reforms*, 32 N.Y.L. Rev. 337 (1982) ("The 1980 presidential election signaled a dramatic shift in the conduct of federal elections").

bution to private financial benefactors. The historical record before Congress established that large private contributions often had this effect.[24] There was less focus on the effect of private expenditures on behalf of candidates, because most benefactors chose the direct contribution route.

That direct avenue was closed by passage of the FECA (which caps political contributions in all federal elections)[25] and the Fund Act (which precludes private contributions to publicly financed presidential candidates). With these reforms, would-be private benefactors began to channel their considerable energies away from money-giving and toward money-raising, with an eye toward spending the money on behalf of the candidate.

The 1980 campaign demonstrates that well-financed, professionally run political committees can, through their "independent" expenditures, render important—and highly visible—assistance to a publicly financed presidential candidate. Such financial assistance—like the large direct contributions of the past—may well cause the candidate to feel beholden to the organizers and managers of these political committees. There inevitably emerges from this situation the haven for quid pro quo, or the equally damaging appearance that they exist.

In 1980, five professionally run, purportedly independent political committees that supported Ronald Reagan spent approximately $10 million on his behalf, about one-third again the $29,400,000 in public funds the official Reagan campaign received.[26] These committees were ap-

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[24] *See Buckley v. Valeo*, 519 F.2d at 837-38; S. Rep. No. 93-689, 93d Cong., 2d Sess. 4-5 (1972).

[25] 2 U.S.C. § 441b.

[26] *See* Note, *The Constitutionality of Regulating Independent Expenditure Committees in Publicly Funded Presidential Campaigns*, 19 Harv. J. on Legis. 675, 687 (1982). *Independent expenditure committees spent $100,000 in support of President Carter during*

pellees National Conservative Political Action Committee ("NCPAC") and Fund for a Conservative Majority ("FCM"), as well as Americans for Change ("AFC"), Americans for an Effective Presidency ("AEP"), and the National Congressional Club ("NCC"), then known as the North Carolina Congressional Club.

The avowed purpose of these five political committees was to circumvent the Fund Act's limit on the campaign expenditures of a publicly funded presidential candidate. Each committee urged contributors to donate money that could not lawfully be contributed directly to Ronald Reagan because Reagan had chosen to accept public funds.[27] For example, Senator Helms, the honorary chairman of NCC, said he launched NCC's "Americans for Reagan" campaign "[b]ecause the Reagan campaign cannot accept *your* contribution."[28] FCM's fundraising literature proclaimed:

> "By law *you* cannot contribute directly to Reagan's campaign now that he has been nominated.
>
> "So it is obvious that *Ronald Reagan needs "Citizens for Reagan in '80"*, the independent campaign sponsored by the nationally respected Fund for a Conservative Majority.
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> • • • •
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> "If you can afford $50, $100, *or as much as $5000* your contribution will be carefully and professionally used to help elect Ronald Reagan President."[29]

These five political committees were run by professionals, many of whom had longstanding ties to the can-

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the 1980 campaign. *Id.* at 687 n.66. A total of approximately $13.7 million was spent as independent expenditures by political committees, individuals, and other groups to influence the 1980 presidential election. Jt. Stip. ¶¶ 126, 162; Exs. 57, 115.

[27] *See, e.g.*, Exs. 66, 67, 69, 51.

[28] Jt. Stip. ¶ 110; Ex. 51 p. 2.

[29] Ex. 67 p. 2 (emphasis in original).

didate or the party's official campaign apparatus.[28] Each committee employed professional speechwriters, public relations and advertising specialists, and media experts;[29] and used sophisticated direct mail fundraising techniques.[30] The press described AEP as "a full-scale campaign—lacking nothing but a candidate—on a parallel track." [31]

The goal of each of the five committees was to complement and assist Ronald Reagan's official election campaign by running carefully targeted shadow campaigns on his behalf.[32] To this end, the committees directed their expenditures—mostly on media advertising—to provide maximum assistance to the candidate's official campaign. NCPAC spent close to $2 million on behalf of Reagan's candidacy.[33] FCM, through its project, "Citizens for Reagan in '80," spent more than $2 million on behalf of Reagan during the 1979-80 election cycle.[34] When AFC was formed in June 1980, it announced plans to spend $20-30 million in support of Reagan's presidential campaign.[35] AFC intended to use its money to run professionally designed media advertisements, surrogate speaking tours, and direct mail promotions.[36] AEP announced

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[28] *See, e.g.*, Jt. Stip. ¶¶ 40-42, 68, 75-77, 79, 80-83, 89, 106, 112, 116-121, 129-171; Exs. 2, 6, 19, 20-22, 28 p. 2, 39-41, 117, 123-126, 128-129, 133, 135-136.

[29] Jt. Stip. ¶¶ 102, 154-155; Exs. 2 p. 4, 68, 64-66, 84.

[30] Jt. Stip. ¶¶ 7, 68, 102, 108, 109, 143, 154-155; Exs. 2 p. 4, 26, 48, 69, 51, 64-66, 84; Drew, *Jesse Helms*, The New Yorker, July 20, 1981, at 91-92.

[31] *The Washington Star*, June 2, 1980, at A-4.

[32] *See, e.g.*, Jt. Stip. ¶¶ 66-69, 92-101, 104-110, 115, 117, 155-159; Exs. 2, 24, 26-28, 47, 56, 89, 116-119, 130-131.

[33] Jt. Stip. ¶ 143; Ex. 57.

[34] Jt. Stip. ¶¶ 154-155; Exs. 64-65, 84.

[35] Exs. 121-122.

[36] Ex. 123.

spending goals of $5 to $30 million.[37] NCC spent close to $4.6 million on behalf of Reagan in the 1980 election.[38]

The professionals who ran these political committees used their expertise and close ties to the official Reagan campaign to tailor their media advertisements to the needs of the official campaign.[39] The committees effectively coordinated their strategies with the official campaign in a variety of subtle, and not so subtle, ways.

For example, appellee FCM's Executive Director, Paul Dietrich, bluntly explained:

> "If I really want a poll from the Republican National Committee or a campaign, I can get it. They'll leak it to me." [40]

Senator Helms similarly confessed:

> "Well, as you may know, we have had an independent effort going on in North Carolina. The law forbids me to consult with [Reagan] and it's been an awkward situation. I've had to, sort of, talk indirectly with Paul Laxalt [Reagan's campaign manager] and hope that he would pass along, uh, and I think the messages have gotten through all right." [41]

Lyn Nofziger, a Reagan campaign official and former Assistant to President Reagan for Political Affairs, gave this version:

> "I wouldn't have to talk to Bill Casey [Reagan's 1980 official campaign director]. I'd have a friend of mine talk to Bill Casey. I wouldn't have any prob-

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[37] Ex. 126.

[38] Drew, *supra* at 91; *see* Jt. Stip. ¶ 166; Ex. 115.

[39] *See* Jt. Stip. ¶¶ 92-94; Ex. 116, 117. *See also NCPAC's Terry Dolan: He's Playing Key Role in New Right's Successes*, Conservative Digest 2, 4-5 (Dec. 1980).

[40] Jt. Stip. ¶ 90; Ex. 24 p. 91.

[41] Ex. 24 pp. 90-91 (Drew, *Politics and Money—II*, The New Yorker, Dec. 15, 1982). *See* Jt. Stip. ¶¶ 124-125.

lem getting that done. There's no way in the world that if I'm running an independent campaign I'm not going to get the information I need, or get Dick Wirthlin's [a Reagan pollster] data, or talk to the chairman of the [Republican] National Committee, or whatever." [46]

Aside from such direct communications, the so-called "independent" committees relied on information the official campaign released to fine-tune their activities to the official Reagan campaign strategy. FCM's Dietrich boasted:

> "There is no way to enforce independence as long as there is a press corps giving us [FCM] information and as long as one group puts out information and gets it to the others." [47]

As Dietrich summed up the situation:

> "All the independent PAC's . . . have a little dance [where] we dance around the law in a way that never breaks the letter but breaks the spirit of the law—but we don't agree with the law anyway." [48]

The record demonstrates that political committee expenditures, even if nominally independent, can be directly and visibly helpful to presidential candidates. The unauthorized political committees that operated in the 1980 campaign repeatedly claimed to have political influence stemming from their fundraising and expenditure activities.[49] Expert observers confirm that the managers of "independent" political committees do have political influence and may receive special consideration as a result of their fundraising and expenditures. Douglas Bailey, a

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[46] Jt. Stip. ¶ 45; Ex. 24 pp. 91-92.

[47] Jt. Stip. ¶ 89; Ex. 24 p. 91; *see* Jt. Stip. ¶¶ 88, 90; Exs. 45, 95-96.

[48] Jt. Stip. ¶ 91; Ex. 24 p. 101.

[49] *See* Note, *supra*, 19 Harv. J. on Legis., at 627 n.44. *See also* Jt. Stip. ¶¶ 67-68; Exs. 89, 94.

prominent political media consultant and a Media Director for AEP in 1980, perceptively observed that:

> "*The people who wield the authority coming out of private fundraising are* not *the people who give the money so much as the people who raise the money,* and that has not significantly changed. If anything, it may have been accelerated [by the $1,000 limit on contributions imposed by the FECA] because *the guy who can raise $11,000 in contributions is the guy who is incredibly important to that campaign and therefore has a significant amount of power.*" [50]

The aftermath of the 1980 election confirms these conclusions. Several people who spearheaded unauthorized political committees received important positions in the Reagan administration. For example, James Edwards, who was a member of AFC's steering committee, later was appointed Secretary of Energy.[51] Thomas Reed, Chairman of the Expenditures Committee of AEP, was named to the President's staff.[52]

Other Reagan fundraisers also appeared to benefit from their efforts. A former Reagan campaign official reportedly stated:

> "The reason Ray Donovan is Secretary of Labor is that he was virtually the only heavy hitter in the Northeast who was raising money for Reagan between 1979 and 1980." [53]

John Loeb, Jr., who is now ambassador to Denmark, "gave a thousand dollars to Reagan and twenty-five hundred dollars to one of the 'independent committees' that

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[50] Jt. Stip. ¶ 132; Ex. 151 p. 5 (emphasis added).

[51] Jt. Stip. ¶ 123; Exs. 135, 137.

[52] 19 Weekly Comp. Pres. Doc. 3 (Jan. 16, 1983); The Wall Street Journal, March 16, 1983, at 5, Col. 1.

[53] Ex. 24 p. 76 (Drew, *Politics and Money—II*, The New Yorker, Dec. 22, 1982).

were formed on Reagan's behalf"; and, it is said, "[o]ther ambassadorial appointments also went to men whose only credentials appeared to be that they had been financially helpful to the Reagan effort."[48]

Major contributors to the committees have also enjoyed special access to administration officials. Large contributors to appellee NCPAC attended confidential policy briefings with Reagan cabinet officials, including Secretary of Agriculture Block, then Secretary of Health and Human Services Schweiker, then Secretary of Transportation Lewis, then Secretary of the Interior Watt, and then Secretary of Energy Edwards.[49]

These examples of apparent special consideration given to managers and contributors involved in "independent" political committees erode public confidence in the integrity of the presidential electoral process, just as special consideration for direct contributors once did. As one political commentator has reported:

> "The 1980 campaign offers an object lesson in the ways in which outside money can once again play a big role in the Presidential campaign . . . . The 1980 election and subsequent events also indicate that large contributors and fund raisers are rewarded with ambassadorships and other important positions."[50]

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[48] *Id.* at 78. It is true that some of this fundraising took place during the presidential primary campaign, in which candidates are permitted to accept private contributions as well as federal matching funds. *See* 26 U.S.C. § 9034. Nonetheless, these examples demonstrate that people who can raise substantial sums of money on behalf of a presidential candidate often receive special consideration for their efforts. *See also* St. Alexander, *supra*, at 58-59 on "ambassadorships for big donors" following the 1972 presidential election. *See generally Buckley* v. *Valeo*, 519 F.2d at 838-40 & nn.32, 36-39.

[49] Jt. Stip. ¶¶ 50-53, 61-62; Exs. 29, 32.

[50] Ex. 24 pp. 57-58 (Drew, *Politics and Money—II*, The New Yorker, Dec. 13, 1982) (emphasis added).

b. *The Absence of Contributor Control Over, or Participation in, the Political Committees' Expressive Activities*

Contributors to the five major unauthorized political committees in 1980 had no say in how the committees spent money, which candidates the committees supported or opposed, or what the committees said about those candidates. Appellees and similar political committees are the mouthpieces only of the professionals who run them.

Individual contributors to appellees NCPAC and FCM "do not determine which candidate [the committee] supports or opposes with their contributions."[51] The NCPAC and FCM articles of incorporation and by-laws deny individual contributors any participatory rights in the conduct of committee affairs.[52] All contributions to NCPAC are at the discretionary disposal of its Chairman.[53] FCM's Board of Directors was responsible for deciding the recipients and magnitude of its 1980 expenditures, but its Chairman had authority to oversee all facets of FCM's operation, including expenditures.[54]

The policies of the other major "independent" political committees were substantially the same. All decisions on how to spend the contributions AFL collected were made by AFL's Expenditures Committee.[55] AFL's campaign literature expressly stated: "The decisions on expenditures must be controlled by the Committee."[56] NCL's ex-

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[51] Jt. Stip. ¶¶ 16, 28.

[52] *See, e.g.*, Jt. Stip. ¶¶ 15-16, 27-28; Exs. 9, 10.

[53] *See* Jt. Stip. ¶¶ 17-22; Exs. 10-15.

[54] Jt. Stip. ¶¶ 26, 28; Ex. 66.

[55] Jt. Stip. ¶ 135; Ex. 131 p. 6.

[56] Appendix (Supp.) 4b to the *Jurisdictional Statement of Appellants, Common Cause* v. *Schmitt*, 455 U.S. 129 (1982).

penditure decisions likewise were made by its Chairman and Executive Director, to the exclusion of contributors.[57]

c. *The Practical Obstacles to Effective Enforcement of the Ban on Subterfuge Contributions*

The FEC cannot effectively enforce the prohibition on coordinated activity between unauthorized political committees and the official campaigns they support. Coordination is often very difficult to uncover and prove. Investigations take time, and can rarely be completed prior to the election in question.

For example, in September 1980, Common Cause filed a complaint with the FEC alleging, *inter alia*, that five political committees, including both appellees, were violating the Fund Act and the FECA by impermissibly coordinating their activities with the official Reagan campaign.[58] Two and one-half years passed without any FEC decision. After Common Cause sued the FEC seeking an order requiring the FEC to act, the FEC's General Counsel recommended that the FEC "take no further action on Common Cause's complaint." The General Counsel did not find an absence of illegal coordination. To the contrary, the General Counsel said:

> "Because enough questions have been raised . . . a finding of no probable cause to believe that violations of Section 441a(a) occurred would not accurately reflect the results of the investigation." [59]

Despite this assessment, the General Counsel concluded that, because "the additional avenues of investigation" necessary to pursue these possibilities "could involve a substantial commitment of resources," the FEC should

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[57] *See North Carolina's Congressional Club Working Hard for Strong America*, Conservative Digest, Dec. 1980, at 16, 17.

[58] The Carter-Mondale Reelection Committee filed a separate complaint making similar allegations.

[59] General Counsel's Report at 7, *In re Reagan*, MUR 1252/1299 (May 24, 1983).

exercise its "prosecutorial discretion" to decline to pursue the matter.[60] On that basis, the FEC voted to "take no further action." Even if the FEC had found, in May 1983, that illegal coordination took place during the 1980 campaign, that finding would have come far too late to have any effect in assuring that the 1980 presidential election was conducted lawfully.

4. *The 1984 Presidential Election*

Appellees have publicly announced that they intend to spend at least $10 million to help reelect President Reagan in 1984.[61] NCPAC has established a $5 million project, called "American Heroes for Reagan." NCPAC has produced a fundraising film entitled "Ronald Reagan's America," which it plans to air on 300 television stations.[62] President Reagan liked NCPAC's film so well that he telephoned NCPAC Chairman Dolan to offer his congratulations. That call should eliminate any doubt that "independent" expenditures by unauthorized political committees can be helpful to a candidate, are noticed by the candidate, and inspire the candidate's gratitude.[63]

As of July 1, 1983, there were over 3400 political committees eligible to make independent expenditures in the 1984 presidential election.[64] Corporate, labor, and trade association political action committees may join the fray. Given the rapid growth, enormous total wealth, and propensity to spend of such committees, the sums that could

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[60] *Id.*

[61] Jt. Stip. ¶ 74; Ex. 38.

[62] *See* Plaintiffs' Second Set of Requests for Admissions Directed to Defendant National Conservative Political Action Committee in *Democratic Party v. National Conservative Political Action Committee* ("*NCPAC*"), 578 F. Supp. 797 (E.D. Pa. 1983) (3-judge court).

[63] Jt. Stip. ¶¶ 64-65.

[64] Jt. Stip. ¶ 165.

be injected into efforts to influence the outcome of future presidential elections could eclipse the public grant.[40]

SUMMARY OF ARGUMENT

Congress found, and the record in this case confirms, that large expenditures of aggregated funds by political committees, even if nominally independent, can be directly and visibly helpful to presidential candidates. Such expenditures therefore provide the same basis for actual or apparent political quid pro quos as large direct contributions once did. This spectacle erodes public confidence in the integrity of the presidential electoral process, just as special consideration for direct contributors once did.

Congress sought to remedy this problem with a prophylactic measure, section 9012(f)(1), which imposes a $1,000 limit on expenditures by unauthorized political committees to further the election of a publicly financed presidential candidate. Section 9012(f)(1) is an essential part of the Fund Act's system of public financing of presidential general election campaigns—a system that "furthers, not abridges, pertinent First Amendment values." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (footnote omitted). This Court has previously sustained the Fund Act's ceiling on campaign expenditures by a publicly financed candidate, and has held that other limits on expenditures in candidate elections are constitutionally permissible if they serve a compelling governmental purpose and are narrowly tailored to effectuate that purpose. In *FEC v. National Right to Work Committee* ("*NRWC*"), 459 U.S. 197 (1982), the Court applied this standard to sustain the constitutionality of a restriction on campaign-related expenditures that was far broader than section 9012(f)(1). The analysis in *NRWC*, and the deference properly owed to Congress' expert judgment in the electoral arena, lead to the conclusion that section 9012(f)(1) is constitutional.

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[40] *See, e.g.*, H. Alexander, *supra* at 84-86.

Section 9012(f)(1) serves three compelling governmental purposes. First, it protects the Presidency from the corrosive effects of large aggregations of financial power. It preserves the integrity of, and public confidence in, the Presidency by minimizing the risk that publicly funded candidates will become, or appear to be, beholden to fundraisers who amass and spend large amounts of money for the candidate's benefit. Second, section 9012(f)(1) effectuates Congress' intent that public financing serve as a substitute for, rather than a supplement to, private fundraising. Third, section 9012(f)(1) prevents evasion of the Fund Act's ban on direct contributions to a publicly financed presidential campaign. The Congresses that enacted and activated the Fund Act were aware that "independent" political committees are ready vehicles for circumventing the law, and that judgment—which the record here supports—is entitled to deference.

Section 9012(f)(1) is narrowly drawn to accomplish its compelling objectives. It applies only to "political committees," whose ability to accumulate and funnel large sums of money poses the greatest threat to presidential candidates. Section 9012(f)(1) places no limit whatsoever on the speech and associational freedoms of individuals or of groups that are not "political committees." Nor does it restrict issue-oriented discussion in any way.

Section 9012(f)(1) does not unnecessarily interfere with the exercise of speech or associational freedoms by anyone. It leaves everyone free to speak and associate effectively in presidential campaigns. The only associational interests that section 9012(f)(1) in any way affects are the "marginal" interests inherent in contributions to political committees. Under *Buckley* and its progeny, Congress may constitutionally limit those interests in order to preserve governmental integrity. Section 9012(f)(1) is altogether different from the across-the-board spending limit struck down in *Buckley*; the Court's analysis in *Buckley* supports the constitutionality of section 9012(f)(1).

Section 9012(f)(1) is not unconstitutionally overbroad. Invalidation of a statute on overbreadth grounds is "strong medicine" to be applied "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Section 9012(f)(1) serves important governmental interests in a broad range of constitutionally permissible applications—including its application to appellees here. The district court's conclusion that section 9012(f)(1) is fatally overbroad finds no support in the record below; rather, it is based on precisely the sort of speculation and conjecture that this Court has found insufficient to sustain First Amendment overbreadth challenges in other contexts. Moreover, even if one could conceive of some impermissible applications of section 9012(f)(1), the proper course is not to invalidate the statute on its face but to cure whatever overbreadth may exist through a case-by-case analysis of the fact situations to which the statute, assertedly, may not be applied. This course would not result in the chilling of protected expression because any person in doubt about the lawfulness of a proposed transaction may obtain an advisory opinion from the Federal Election Commission.

ARGUMENT

This Court has twice upheld the Fund Act against First Amendment challenges. In *Buckley v. Valeo*, the Court rejected a broad array of constitutional challenges to the Fund Act, concluding that the Act

> "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the Fund Act] *furthers, not abridges, pertinent First Amendment values.*"[66]

Buckley also held that Congress did not violate the First Amendment by banning private contributions to publicly

[66] 424 U.S. at 92-93 (emphasis added; footnotes omitted).

funded presidential campaigns, or by prohibiting publicly funded campaigns from making expenditures in excess of the public subvention.[67] More recently, in *Republican National Committee v. FEC*, the Court summarily affirmed a lower court ruling that the Fund Act's ban on private contributions to publicly funded candidates is consistent with the First Amendment rights of candidates and their supporters.[68] The Court should similarly sustain the constitutionality of section 9012(f)(1).[69]

I. THE FIRST AMENDMENT PERMITS LIMITS ON CAMPAIGN-RELATED EXPENDITURES WHERE NECESSARY TO ACHIEVE COMPELLING PUBLIC PURPOSES UNRELATED TO THE SUPPRESSION OF IDEAS OR INFORMATION

First Amendment freedoms are not absolute. The First Amendment affords the greatest protection against governmental attempts to censor speech or suppress ideas because of some supposed danger flowing from their effect on the audience. Such censorial restrictions on speech can be justified only in very narrow circumstances—for example, by proof of an overwhelming public exigency or of the utter worthlessness of the message.[70]

A less strict First Amendment standard applies to restrictions on speech or expressive activity that are designed to obviate serious public evils other than dangers

[67] *Id.* at 57 n.65.

[68] 487 F. Supp. 280 (S.D.N.Y.) (3-judge court), 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980).

[69] *Amicus curiae* Common Cause agrees with the position of appellants Democratic Party of the United States, *et al.*, and the ruling of the district court, that private parties may file suit under 26 U.S.C. § 9011(b) to "implement or construe" the Fund Act. In this brief, Common Cause addresses only the constitutionality of section 9012(f)(1).

[70] *See, e.g., Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-73 (1942) (fighting words); *see generally Bose Corp. v. Consumer's Union of the United States, Inc.*, 52 U.S.L.W. 4513, 4518 (U.S. April 30, 1984).

supposedly inherent in the ideas or information expressed. Here, the accepted test of constitutionality is whether the regulation serves an "important" or "compelling" public purpose. Even a statute that directly restricts speech may be sustained if the statute is "a narrowly ' ilored means of serving a compelling state interest." [71]

The Court's recent decision in *FEC v. National Right to Work Committee* ("*NRWC*") exemplifies this weighing process. In *NRWC*, the Court unanimously upheld a restriction on campaign contributions *and expenditures* that was far broader than section 9012(f)(1). In *NRWC*, the Court sustained the constitutionality of 2 U.S.C. § 441b of the FECA, which prohibits all expenditures and contributions by all corporations, labor unions, and national banks in connection with all federal elections.[72]

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[71] *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 535 (1980). *Accord Members of the City Council v. Taxpayers for Vincent*, 52 U.S.L.W. 4504, 4508 (U.S. May 15, 1984) ("It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech where necessary to advance a significant and legitimate state interest."); *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982); *United States v. Grace*, 103 S. Ct. 1702 (1983); *Buckley v. Valeo*, 424 U.S. at 25.

The same test applies to statutes that restrict associational freedoms, even in the context of political campaigns. As the Supreme Court stated in *Buckley*:

> "Even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 (citations omitted).

See also Democratic Party v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124 (1981); *United States Civil Service Commission ("CSC") v. National Association of Letter Carriers*, 413 U.S. 548, 567 (1973).

[72] *See Athens Lumber Co. v. FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (per curiam), *cert. denied and app. dismissed*, 104 S. Ct. 1580 (1984).

The district court here was, of course, wrong in stating that *NRWC did* not involve an expenditure limit. *See Democratic Party v. NCPAC*, 578 F. Supp. at 820. The district court was wrong also

The Court expressed its holding in broad terms. It first confirmed that "[n]either the right to associate nor the right to participate in political activities is absolute." [73] It then "place[d] respondent's constitutional claims in proper perspective" by repeating what it had said in *Buckley v. Valeo*: "'The constitutional power of Congress to regulate federal elections is well established . . . .'" [74]

The Court emphasized the importance of the anticorruption rationale that supports section 441b's total ban on corporate and labor union contributions and expenditures—a rationale that also supports the lesser restriction found in section 9012(f)(1):

> "'The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. *The importance of the governmental interest in preventing this occurrence has never been doubted.*'" [75]

The Court in *NRWC* particularly emphasized the "considerable deference" due to Congress' "careful legislative adjustment of the federal election laws" to deal with the dangers posed by large aggregations of private wealth.[76] It specifically endorsed Congress' judgment that "the differing structures and purposes" of different entities "may require different forms of regulation in order to protect

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in belittling *NRWC* as a "corporations case." *Id.* at 822. The National Right to Work Committee was, in fact, an ideological organization whose purpose and activities were not unlike those of appellees here.

[73] 459 U.S. at 207 (quoting *CSC v. National Association of Letter Carriers*, 413 U.S. at 587).

[74] 459 U.S. at 207 (quoting *Buckley v. Valeo*, 424 U.S. at 13).

[75] 459 U.S. at 208 (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)) (emphasis added; citations omitted).

[76] 459 U.S. at 209.

the integrity of the electoral process." [77] Moreover, the Court emphasized that Congress was the proper body to make these expert judgments:

> "[W]e accept Congress' judgment that it is the potential for such influence that demands regulation. *Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.*" [78]

This Court has followed this approach—weighing the justification for the restriction against the burden it imposes—in sustaining other limits on campaign contributions and expenditures. In *Buckley v. Valeo*, the Court found that the goals of the Fund Act justify the Act's ceiling on the amount a publicly financed candidate can spend on his campaign.[79] *Buckley* also held that congressional concerns about corruption and the appearance thereof are sufficiently compelling to outweigh the interference with First Amendment freedoms worked by a $1,000 limit on individuals' contributions.[80] And in *California Medical Association v. FEC*, the Court held that the "important governmental interests in preventing the corruption or appearance of corruption of the political process" justify limiting the amount that an unincorporated association may contribute to a multicandidate po-

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[77] *Id.* at 210 (footnote omitted) (quoting *California Medical Association v. FEC*, 453 U.S. at 201).

[78] 459 U.S. at 210 (emphasis added). The district court failed to accord any deference whatever to Congress' expert judgment, despite this Court's clear admonition in *NRWC*. The court ignored the judgment of Congress and substituted its own highly speculative assessment of the effects of unauthorized political committee expenditures. *See Democratic Party v. NCPAC*, 578 F. Supp. at 830-31. Indeed, the court conceded that its assessment was based not on the "legislative facts" before Congress or the "adjudicative facts" adduced by the parties, but on its own "experience." *Id.* at 812, 837.

[79] 424 U.S. at 57 n.65.

[80] *Id.* at 29.

litical committee formed to express the association's political views.[81]

Section 9012(f)(1) is not a governmental attempt to censor ideas because of some supposed danger flowing from their content or effect on the audience. Like the provision sustained in *NRWC*, section 9012(f)(1) was enacted to remedy what Congress perceived to be serious public problems other than any dangers inherent in the ideas expressed. Application of the Court's analysis in *NRWC* to section 9012(f)(1) leads to the conclusion that section 9012(f)(1) is constitutional.

II. SECTION 9012(f)(1) SERVES COMPELLING GOVERNMENTAL INTERESTS

A. Section 9012(f)(1) Protects the Presidency From the Corrosive Effects of Private Financial Support

Starting in 1907, many Congresses have passed, and Presidents have signed, legislation designed to safeguard the integrity of elected federal officeholders—above all, the President.[82] Through these measures, the political branches of government—acting on the basis of their special knowledge, and supported by widespread public concern over corruption in government—have sought to deal with a recurring evil that the Supreme Court recognized a century ago: "the free use of money in elections." [83]

Courts have long recognized that preserving the integrity (and the appearance of integrity) of elected federal

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[81] 453 U.S. at 195.

[82] *See* Justice Frankfurter's discussion of the history of these enactments in *United States v. UAW*, 352 U.S. at 570-83. *See also Pipefitters Local 562 v. United States*, 407 U.S. 385, 402-13 (1972); *United States v. CIO*, 335 U.S. 106, 113-15 (1948); *Burroughs v. United States*, 290 U.S. 534, 544-48 (1934).

[83] *Ex Parte Yarbrough*, 110 U.S. 651, 667 (1884). *See also United States v. UAW*, 352 U.S. at 575 (referring to the "continuing congressional concern for elections 'free from the power of money' ").

officeholders is a paramount governmental interest. In *Burroughs v. United States*, the Court, sustaining the constitutionality of the Federal Corrupt Practices Act of 1925 as applied to presidential elections, said:

> "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. *To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.*" [54]

Similarly, in *NRWC*, *Buckley v. Valeo*, and *California Medical Association v. FEC*, the Court specifically affirmed the importance of preventing both actual corruption and erosion of public confidence in the electoral process through the appearance of corruption.[55] "These interests directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.' " [56]

Congress enacted the Fund Act and activated it in 1973 as a means of combatting the corrosive effect of private money on the nation's highest elected office. "[T]he deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." [57] By offering a presidential candidate the option of receiving a generous public grant at the outset of the general election campaign, Congress sought to create a strong incentive for the candidate to forswear private fundraising, thus eliminating the likelihood that he would find himself beholden to private benefactors:

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[54] 290 U.S. at 545 (emphasis added).

[55] 459 U.S. at 210; 424 U.S. at 26-27; 453 U.S. at 197.

[56] *NRWC*, 459 U.S. at 208 (quoting *United States v. UAW*, 352 U.S. at 570).

[57] *Buckley v. Valeo*, 424 U.S. at 27 (footnote omitted).

> "If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign." [58]

The legislative history fully reflects this purpose. The Fund Act's sponsor, Senator Pastore, stated it eloquently:

> ". . . We are trying to rid this Government of the power of money and give it back to one man, one vote, one dollar. That is all we are talking about." [59]
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> "The principle is still the same. It is the public financing of a Presidential campaign. In order to obviate the $1,000 dinners, the scandalous situations that we read about every day when we pick up the newspapers, the fact that the President of the United States becomes beholden, ... [A]ll we are saying is, 'Let's be done with it. Let the President be a free and independent man. Let him not be beholden to anyone.' " [60]

Senator Bentsen stressed that the "most compelling reason [why] we should enact legislation which permits a form of public financing of campaign funding" is to end "the deterioration of confidence of the people in their public officials." [61]

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[58] *Republican National Committee v. FEC*, 487 F. Supp. at 284.

[59] 117 Cong. Rec. 42408 (1971).

[60] 119 Cong. Rec. 38900 (1973). These views were widely echoed by other legislators. *See, e.g.*, 117 Cong. Rec. 41938 (1971) ("Preserving the independence of the President is absolutely vital.") (remarks of Sen. Mansfield); *id.* at 41780 ("Big money buys entree. Big money buys favors. Favoritism, legal or otherwise, perverts the democratic process.") (remarks of Sen. Eagleton).

[61] 117 Cong. Rec. 41767 (1971). The concern for the erosion of public confidence in government was widely shared. *See, e.g.*, 117 Cong. Rec. 41776, 41778 (1971) (remarks of Sen. E. Kennedy); 117 Cong. Rec. 41780 (1971) (remarks of Sen. P. Hart).

Congress recognized that the dangers it sought to eliminate were posed by private fundraising organizations as well as by large individual contributions. Congress therefore designed the Fund Act to enable the nation "to have a President elected who would be able to make his appointments without determining that he has to send this man as an ambassador there because he *raised* $100,000, *or to do this for this group because of the money they raised*." [92]

Without section 9012(f)(1), the Fund Act would fall short of achieving this compelling congressional goal. The record in this case demonstrates that there is a serious danger of political indebtedness through large expenditures of aggregated funds and that this danger is particularly great in the case of a publicly financed candidate, who may not accept direct contributions.[93] Both the record before Congress and the evidence in this case demonstrate that the risk of obligation—and the appearance thereof—is not illusory.

The power wielded by political committees such as appellees is not diminished simply because of the purported independence of their campaign efforts. As the record demonstrates, the operators of "independent" political committees can acquire influence with the candidate and his staff by financing and running consciously parallel shadow campaigns. Two political scientists who reviewed

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[92] 117 Cong. Rec. 41945 (1971) (emphasis added) (remarks of Sen. Chiles).

[93] The district court correctly found that "some extremely large and professionally managed expenditures made independently of the candidate's official campaign may create the appearance of corruption . . . ." *Democratic Party v. NCPAC*, 578 F. Supp. at 802; *see id.* at 831, 837-38. But that court went on to say, directly contradicting the factual record, that many expenditures by political committees will "be used in an amateurish fashion [and] may produce an image contrary to that which the candidate hopes to project." *Id.* at 831.

the 1980 presidential election concluded that such committees' expenditures

> "pose as much potential for creating implicit obligations as do coordinated expenditures. This is especially obvious in the case of independent political committees operated by party professionals who raise and control multimillion dollar war chests." [94]

The record also demonstrates that purportedly independent political committees can and do garner influence with candidates and their staff by claiming to act on behalf of the candidate and by promoting themselves as surrogates for the campaign coffers that a candidate closes when he chooses to receive public financing. President Reagan's call to NCPAC's Terry Dolan shows that a candidate's "independent" benefactors know perfectly well how to help him, and the candidate knows who is helping him and how much help he is getting. As one observer summed it up:

> "The real or effective financial constituency in these circumstances is the PAC and its leadership, not the small givers to PAC campaign warchests. The candidate knows the programs and objectives of the PAC, and it is to the PAC officers that preferred access is given." [95]

This phenomenon erodes public confidence in the integrity of government:

> "[I]ndependent expenditures will be taken by a large segment of the public as evidence of liaison between

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[94] Claude & Kirchhoff, *supra*, at 364. *See also* Note, *supra*, 18 Harv. J. on Legis. at 698:

> "The taint of the corruptive quid pro quo cannot categorically be restricted to contributions and non-independent expenditures. The candidate—and the public—may perceive that a debt is owed even when an expenditure is technically independent."

[95] Adamany, *PAC's and the Democratic Financing of Politics*, 22 Ariz. L. Rev. 569, 586 (1980).

officeholders and spenders, who will be assumed to have required some influence over public policy as a consequence of their outlays." [96]

The district court erroneously assumed that only the existence or likelihood of illicit *financial* gain could justify a congressional limitation on campaign-related spending by political committees.[97] But that assumption is at odds with this Court's determination in *Buckley* and *NRWC* that Congress may constitutionally seek to eliminate *all* forms of quid pro quo (or the appearance thereof) in federal elections.[98] As *Buckley* makes clear, an economic motive is not a necessary predicate to the potential for corruption, or the appearance thereof. Having imporant policy decisions controlled by fundraisers to whom a president feels obligated is inconsistent with democratic government and the citizenry's confidence in it.[99] Similarly, subvervision of the President's respon-

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[96] *Id.* at 586 n.135.

[97] *See Democratic Party v. NCPAC*, 578 F. Supp. at 838. ("Even large expenditures made by political committees not attached to any business or union create little appearance of corruption since there is little the president can do to benefit such committees financially."); *id.* at 837 ("so long as the political committees are organized for purely ideological purposes, the president can do little to reciprocate in a manner that might fairly be called corruption").

[98] *See Buckley*, 424 U.S. at 26-27 ("To the extent that large contributions are given to secure a *political quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined") (emphasis added); *NRWC*, 459 U.S. at 199 (discussing ideological purpose of National Right To Work Committee).

[99] A particularly unsubtle example may illustrate the point. In 1981, appellee NCPAC's National Chairman wrote Congressman Neal:

> "If you will make a public statement in support of the President's tax cut package and state that you intend to vote for it, we will withdraw all [independent, hostile] radio and newspaper ads planned in your district. In addition, we will be glad to run radio and newspaper ads applauding you for your vote to lower taxes." 127 Cong. Rec. H4911 (daily ed. July 27, 1981).

siveness to the voters who elected him is corruption that Congress may constitutionally seek to remedy.

The district court's decision that section 9012(f)(1) violates the First Amendment was based in large part on its finding that "plaintiffs have produced virtually no evidence of actual corruption and little admissible evidence of the appearance of corruption." [100] Quite apart from the crabbed meaning the court gave to "corruption," the court's way of thinking turns constitutional analysis upside-down. Judicial evaluation of the constitutionality of a statute that Congress has found to be a necessary prophylactic—in an area where Congress' judgment is entitled to deference—should not turn on whether the evil Congress sought to prevent can be proved to have occurred in a single election. Appellants do not have to prove that a bribe was offered or accepted in the 1980 campaign for Congress' enactment to be found constitutional.[101]

Congress enacted section 9012(f)(1) to allay its concern that corruption and the appearance thereof might taint publicly financed presidential elections. The court below erred in "second guess[ing this] legislative determination." [102] Moreover, the record amply confirms Congress' judgment. If section 9012(f)(1) is invalidated, political committees representing private interests of all kinds would once again be free to leave "sort of a calling card, something that would get us in the door and make our point of view heard." [103] The campaign finance clock would be turned back, to the nation's detriment.

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[100] *Democratic Party v. NCPAC*, 578 F. Supp. at 892.

[101] *Buckley v. Valeo*, 424 U.S. at 27-28.

[102] *NRWC*, 459 U.S. at 210.

[103] *Hearings Before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess. 5442 (1973) (testimony of Orin Atkins, then Chairman of Ashland Oil Company).

B. Section 9012(f)(1) Effectuates Congress' Intent That Public Financing Be an Alternative to Privately Financed Campaigns

Congress intended public financing in the general election to serve as a substitute for, and not a supplement to, privately raised campaign funds.[104] Invalidating section 9012(f)(1) would defeat this congressional purpose by allowing millions of dollars in privately raised contributions to swamp the public grant.

Unauthorized political committees spent approximately $11 million to influence the 1980 presidential race.[105] The pro-Reagan expenditures supplemented by almost a third the $29.4 million Reagan received from the United States Treasury. Absent section 9012(f)(1), independent expenditures by unauthorized political committees are likely to continue to increase in the 1984 election and future presidential campaigns.[106]

The invalidation of section 9012(f)(1) would undermine the alternative system of campaign financing that Congress intended to create.[107] It would also defeat the central purpose of the Fund Act and revive the evils the Fund Act was intended to eliminate. Section 9012(f)(1) thus serves a compelling governmental interest in preventing the wholesale subversion of the core idea of public financing—to allow a candidate to rid himself of the

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[104] *See, e.g.*, 117 Cong. Rec. 41780 (1971) (statement of Sen. P. Hart that the public fund is not intended to be a "base for ever-increasing campaign spending"). *See also Buckley v. Valeo*, 424 U.S. at 99; *Republican National Committee v. FEC*, 487 F. Supp. at 282-83.

[105] Jt. Stip. ¶¶ 162, 175.

[106] *See, e.g.*, H. Alexander, *supra* at 84-86; Claude & Kirchhoff, *supra* at 364-65.

[107] *See Republican National Committee v. FEC*, 487 F. Supp. at 285 ("The public interest purposes behind the decision of Congress to provide for the financing of presidential elections would hardly be served unless some reasonable limits and conditions were imposed.").

burdens and entanglements of private financial benefactors.

C. Section 9012(f)(1) Prevents Evasion of the Fund Act's Ban on Contributions to, and Its Limit on Expenditures by, Publicly Financed Presidential Candidates

Political committees such as appellees are obvious vehicles for evading the Fund Act's ban on private contributions to, and its limit on expenditures by, a publicly financed campaign. The Congresses that enacted and activated the Fund Act in 1971 and 1973 knew from first-hand experience that "independent" political committees had subverted prior federal limits on campaign contributions and expenditures.

> "These federal ceilings on both contributions and expenditures were widely circumvented through the proliferation of committees. Committees openly supporting candidates called themselves independent, claiming to operate without the knowledge or consent of the candidates. . . . Often they were vest pocket committees." [108]

The proliferation of "independent" committees was one of the primary evils that the election law reforms of 1971 were designed to rectify:

> "[P]rior to 1971 the laws regulating Federal campaigns permitted an infinite proliferation of *political committees which were ostensibly separate entities but which were in fact a means for advancing a candidate's campaign.* That deficiency brought the campaign laws into disrepute and provided an essential predicate for the 1971 and 1974 reforms that the Congress enacted." [109]

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[108] Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 365 (1977).

[109] H.R. Rep. No. 917, 94th Cong., 2d Sess. 5 (1976) (emphasis added). The same point was made in the floor debate on the Fund

Congress' judgment that "independent" political committees are ready tools for circumventing the law is entitled to deference.[110] The record in this case confirms Congress' determination. Indeed, appellees have acknowledged that their "independent" campaign activities during the 1980 election violated the spirit, if not the letter, of the law, even apart from section 9012(f)(1).[111] They of course squarely violated that section.

As Congress foresaw, the Fund Act's ban on coordinated expenditures is virtually impossible to police effectively during a presidential campaign.[112] Congress accordingly determined that a prophylactic rule was required. It enacted section 9012(f)(1), presaging the Supreme Court's admonition not to "naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence . . . ."[113] As the Court emphasized in *NRWC*, courts should not "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared."[114]

III. SECTION 9012(f)(1) IS NARROWLY TAILORED TO DEAL WITH THE MOST SERIOUS THREATS TO THE INDEPENDENCE AND INTEGRITY OF PUBLICLY FINANCED PRESIDENTIAL CANDIDATES

Section 9012(f)(1) places no limit on expenditures by any individual of his own money to support presidential

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Act: "In mentioning political committee, as the present terms of the bill does, the desire, of course, *is to prevent any political committee from being formed as a subterfuge* . . . ." 117 Cong. Rec. 42397 (1971) (remarks of Sen. Taft).

[110] *See NRWC*, 459 U.S. at 210.

[111] *See* Jt. Stip. ¶¶ 90, 91.

[112] *See* Statement of the Case Part B3c.

[113] *Buckley* v. *Valeo*, 424 U.S. at 45.

[114] 459 U.S. at 210.

candidates. It applies only to "political committees," and that term does not include individuals.[115]

Section 9012(f)(1) does not reach groups of individuals that do not constitute "political committees" within the meaning of the Fund Act. Thus, section 9012(f)(1) imposes no restriction on the freedom of two or more individuals, pooling and using their own money, to engage jointly in personal expression in support of their preferred candidate. The legislative history confirms that Congress did not intend to restrict the activities of groups of individuals who engage jointly in personal expression paid for out of their own pockets.[116] Nor does Section 9012(f)(1) reach groups or committees engaged in issue-oriented communication. The definition of "political committee" reaches only those entities that accept contributions or make expenditures "for the purpose of influencing" a federal election.[117]

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[115] *See* 26 U.S.C. § 9002(9). The Conference Committee specifically rejected a Senate provision that would have subjected individuals to section 9012(f)(1). H.R. Rep. No. 708, 92d Cong., 1st Sess. 58 (1971).

[116] Senator Taft had proposed to amend section 9012(f)(1) by deleting the term "political committee" and substituting the much broader clause "any corporation, labor organization, partnership, association, political committee, political education committee, or any other committee." 117 Cong. Rec. 42397 (1971). Senator Pastore opposed this broad language because, in his view, it would have brought personal expression within the prohibition of section 9012(f)(1). *Id.* at 42399 ("I do not want to begin to straitjacket organizations that have a legal right, because of the character of their constitution, to proceed to express their *personal* opinion . . . ." (Emphasis added). Senator Pastore clearly believed that groups of individuals should be free to pool and spend their own money for their own personal expression. *See id.* at 42398 ("a group on a campus, say faculty members"); 42401 (same); 42626 (a group of people who want to get together, pool their own money, and hire a hall to hold a mass meeting). Senator Pastore's view prevailed, and the Taft amendment was defeated. *Id.* at 42402.

[117] 26 U.S.C. § 9002(9).

The line between "political committees" and other groups is not unconstitutionally vague.[119] The Court has recognized the difference between a "political committee" that raises and spends other people's money, and a group of individuals who retain control over their pooled resources in order to express views the individuals hold in common.[120] The Court has also drawn a clear line between a "political committee" and an issue-oriented organization.[120]

Section 9012(f)(1) thus is specifically tailored to eliminate the most serious threats to the independence and integrity of publicly financed presidential candidates. It applies only to campaign-related entities—"political committees"—that collect and spend other people's money.[121] Such committees constitute uniquely potent vehicles for acquiring improper political influence, not only because their aggressive mechanized fundraising techniques permit the committees' managers to amass huge political warchests, but also because control over the funds resides in a handful of fundraiser/managers who thus enjoy enormous leverage.[122]

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[119] The appellees here could not, in any event, press that argument. Both appellees indisputably are "political committees." Because appellees fall "squarely within the 'hard core' of the statute's proscriptions," they may not properly challenge its constitutionality based on its alleged possible application to other entities. *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973); *NRWC*, 459 U.S. at 210-11; *California Medical Association v. FEC*, 453 U.S. at 197 n.17. *See* Argument Part VI, *infra*.

[120] *California Medical Association v. FEC*, 453 U.S. at 197 n.17.

[120] *Buckley*, 424 U.S. at 79.

[121] *See* Statement of the Case Part IIIb.

[122] *See id.* Because of the vast amount of money they can raise and control, political committees pose a much greater threat to the independence and integrity of publicly funded candidates than do individuals, whether acting singly or jointly. There are, to be sure, some wealthy individuals who may make large personal expenditures to support a publicly funded candidate. But such expenditures will usually pale beside the sums that political committees can pump into shadow campaigns.

The conclusion that section 9012(f)(1) is appropriately tailored to effectuate Congress' valid concerns is not affected by the possibility that some political committees might act in such a manner that the potential dangers would not materialize. It is enough that Congress reasonably found that political committees generally pose a potential for serious harm and enacted a statute designed to deal particularly with it.[123] Congress did the same thing when it placed limits on all political contributions even though some large contributions might not actually give rise to corruption, and the Court, in *Buckley*, upheld that judgment.[124]

IV. SECTION 9012(f)(1) LEAVES AMPLE ROOM FOR THE EXERCISE OF SPEECH AND ASSOCIATIONAL FREEDOMS

Section 9012(f)(1) does not unduly interfere with the exercise of First Amendment freedoms. It operates only in connection with publicly funded presidential elections and only with respect to candidates who have chosen to forego private financial support. Section 9012(f)(1) leaves individuals (and groups of individuals acting jointly) free to engage in unlimited independent advocacy, using their own money for their own political expression, in presidential and all other political campaigns. It does not cap the aggregate amount of money that can be spent for expression in support of a candidate.[125]

Section 9012(f)(1) leaves open to everyone broad avenues for the exercise of speech and associational free-

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[123] In *NRWC*, the Supreme Court "accept[ed] Congress' judgment that it is the *potential* for such influence that demands regulation." 459 U.S. at 210 (emphasis added).

[124] *Buckley v. Valeo*, 424 U.S. at 24-29.

[125] *Cf. id.* at 22.

doms in connection with publicly-funded presidential elections. For example, anyone may contribute his time and energy to work for any candidate, political party, committee, group, or other entity.[126] Such participation encompasses a wide variety of traditional "grass-roots" activities. Accordingly, section 9012(f)(1), like the contribution limits upheld in *Buckley*, leaves every person completely "free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." [127]

Moreover, citizens have numerous other ways to support publicly financed candidates. For example, individuals (acting either singly or jointly) may purchase advertisements in local newspapers;[128] they may purchase local billboard space; they may prepare, reproduce and distribute handbills to their fellow citizens; and they may speak out in other forums to advocate the election of their favored candidate.

Individuals may also participate in more broadly based efforts. Section 9012(f)(1) leaves all persons free to help a publicly financed candidate by contributing money to his party's national committee, which may in turn spend up to a specified limit (approximately $4.7 million in 1980) to promote the party's national ticket.[129] Every individual also may support a publicly financed candidate by contributing money to his party's state and local

[126] *See* 2 U.S.C. § 431(8)(B)(i).

[127] 424 U.S. at 22.

[128] They can, of course, also purchase advertisements in more expensive, nationally circulated newspapers, since the Fund Act imposes no ceiling on independent expenditures by individuals. Some persons have in fact purchased such advertisements. *See, e.g., The New York Times*, Oct. 30, 1980, at B8, cols. 1-3.

[129] *See* 2 U.S.C. §§ 441a(a)(1)(B), 441a(d)(2). The limit is equal to two cents times the national voting age population, adjusted for changes in the Consumer Price Index. *See* 2 U.S.C. §§ 441a(c), (d)(2).

committees, which may in turn use as much of their money as they wish to support the candidate through campaign materials and get-out-the-vote activities.[130] And section 9012(f)(1) allows everyone to support large-scale media discussions of particular issues by contributing money to issue-oriented organizations that buy radio, television, and newspaper space to advocate their positions.

The only associational interests that section 9012(f)(1) affects are the "marginal" interests inherent in making contributions to political committees. In this case, as in *Buckley v. Valeo* and *California Medical Association*, the contributor seeks only to pay for the speech of another—for speech that the contributor neither composes, nor publishes, nor controls.[131] Congress can constitutionally limit these interests in order to protect the integrity of elected federal officeholders and preserve public confidence in government. Even "broad restrictions on . . . associational freedoms" can constitutionally be imposed to achieve these goals where, as here, everyone remains free to " '[e]xpress his opinion as an individual privately and publicly on political subjects and candidates.' " [132]

[130] *See* 2 U.S.C. § 431(9)(B)(viii), (ix).

[131] *See* 424 U.S. at 21. The district court erroneously concluded that the expenditures made by the appellee political committees were "amplified individual speech presumptively entitled to full constitutional protection." *Democratic Party v. NCPAC*, 578 F. Supp. at 820. The stipulated evidence, however, demonstrates that contributors to the appellee committees do not control how the committees spend their money, what candidates the committees support or oppose, or what the committees say about those candidates. *See* Statement of the Case Part B3b. Indeed, the district court recognized that "contributors realized, or should have realized, that they had little control over the PAC's immediate use of their money." 578 F. Supp. at 819.

[132] *Buckley v. Valeo*, 424 U.S. at 48 n.54 (discussing and quoting *CSC v. National Association of Letter Carriers*, 413 U.S. at 579); *see NRWC*, 459 U.S. at 207 ("[W]e conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b.").

V. *BUCKLEY v. VALEO* DOES NOT REQUIRE THE COURT TO INVALIDATE SECTION 9012(f)(1)

In *Buckley v. Valeo*, the Court struck down an across-the-board $1,000 limit on independent spending by any individual or group in any federal election. Section 9012(f)(1) is altogether different from the provision at issue in *Buckley*. The *Buckley* decision, therefore, does not require invalidation of section 9012(f)(1).

First, the limitation overturned in *Buckley* prohibited "all individuals and all groups" from engaging in independent advocacy.[133] Section 9012(f)(1), by contrast, leaves all individuals and many groups completely free to spend their own money to express their own views without restriction. The limit in section 9012(f)(1) applies only to a very narrow class of entities—political committees that raise and spend other people's money on behalf of a publicly funded presidential candidate. As the Court recognized in *NRWC*, the special characteristics of such organizations and their control over large aggregations of private wealth justify "particularly careful regulation" in order to preserve the integrity of the electoral process.[134]

Second, the restriction at issue in *Buckley* applied to all elections for all federal offices. Section 9012(f)(1) applies—and is needed—only where the expenditures are to be made on behalf of a presidential candidate who has himself chosen to forego private financial support. In that context section 9012(f)(1) serves to effectuate Congress' intent that public financing be an alternative to private fund-raising—a compelling governmental interest not considered by the Court in *Buckley* in evaluating the broader spending limit there at issue. The Court, in both *Buckley* and *Republican National Committee v. FEC*, has recognized that the compelling interests that

[133] 424 U.S. at 40.

[134] 459 U.S. at 209-10.

support the Fund Act justify restrictions on contributions *and expenditures* that would not be permissible outside the context of a public financing scheme.

Third, unlike the "independent expenditure" limit considered in *Buckley*, section 9012(f)(1) does not necessarily diminish the amount of political speech in an election year. Individual contributors, as well as the organizers and managers of "independent" political committees, who wish to voice their support for a particular candidate are all free to do so, using their own money.

Fourth, the Court in *Buckley* found, on the record before it in 1975, that independent expenditures by individuals and groups of individuals did not "presently appear" to pose significant dangers of real or apparent corruption. But the Fund Act's public financing scheme had not yet been used in 1975 and "independent" expenditure campaigns by political committees did not exist. Thus, in reaching its conclusion that independent expenditures did not "presently appear" to pose the dangers associated with large direct contributions, the *Buckley* Court was concerned primarily with the independent efforts of individuals and informal groups, rather than the full scale, professional shadow campaigns waged by appellees and similar political committees. By basing its decision on events as they "presently appear[ed]," the Court recognized that new patterns of conduct and new evidence of threats to the electoral process posed by purportedly independent spending might well cause the First Amendment balance to be struck differently. The events of the 1980 election, and the undisputed record in this case, establish that the "independent" expenditure campaigns orchestrated by appellees and similar political committees pose precisely the dangers of beholdenness and special consideration that did not "presently appear" in *Buckley*.[135]

[135] 424 U.S. at 46.

The district court held that "*Buckley* and its progeny allow restrictions on true campaign speech only to prevent corruption or its appearance . . . ." [138] That was a mistake. *Buckley* did not single out the prevention of corruption as the sole legitimate purpose for restrictions on campaign speech. In sustaining the constitutionality of public financing provisions generally, the Court did not rely solely on their role in "reduc[ing] the deleterious influence of large contributions," but also on their role in "facilitat[ing] communication by candidates with the electorate, and . . . free[ing] candidates from the rigors of fundraising." [137] Similarly, in *Republican National Committee v. FEC*, the Court summarily affirmed lower court decisions that upheld the constitutionality of the Fund Act's candidate expenditure limit and contribution ban because they served the "compelling state interest[]" of freeing candidates from the burdens of fundraising.[138]

In *California Medical Association v. FEC*, the Court sustained a limit on the amount that can be contributed to a political committee. The Court did not rely solely on the statute's anticorruption rationale. It pointed to the statute's other purposes: restricting circumvention of the limits on contributions to candidates; ensuring full disclosure of contributions; and—notably, for this case—"minimiz[ing] the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign." [139]

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[136] *Democratic Party v. NCPAC*, 578 F. Supp. at 802 (emphasis added); *see id.* at 817-18.

[137] *Buckley*, 424 U.S. at 91-96.

[138] *Republican National Committee v. FEC*, 487 F. Supp. at 285.

[139] *California Medical Association v. FEC*, 453 U.S. at 198 & n.18 (quoting H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess., 57-58 (1976)).

And in *NRWC*, in sustaining the ban on corporate contributions and expenditures, the Court relied on the statute's role in protecting minority shareholders as well as its anticorruption rationale.[140]

Because the district court misread *Buckley*, it erroneously scouted the role section 9012(f)(1) plays in accomplishing two important congressional objectives beyond combatting corruption—ensuring that public financing is a substitute for, not a supplement to, private financing,[141] and preventing evasion of the ban on subterfuge contributions.[142]

In sum, the Court's rationale for invalidating the across-the-board expenditure limit at issue in *Buckley* is not applicable here.

VI. SECTION 9012(f)(1) SHOULD NOT BE INVALIDATED AS UNCONSTITUTIONALLY OVERBROAD

Invalidation of a statute on overbreadth grounds is "strong medicine" to be applied "sparingly and only as a last resort." [143] The district court misapplied the overbreadth doctrine when it struck down section 9012(f)(1).

The general rule in constitutional adjudication is "that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." [144] This rule effectuates important constitutional principles and policies. It

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[140] *NRWC*, 459 U.S. at 206.

[141] *See* Argument Part IIB.

[142] *See id.* Part IIC.

[143] *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), quoted in *New York v. Ferber*, 458 U.S. 747, 769 (1982); *see City Council v. Taxpayers for Vincent*, 52 U.S.L.W. 4594, 4597 (U.S. May 15, 1984).

[144] *New York v. Ferber*, 458 U.S. at 767; *Broadrick v. Oklahoma*, 413 U.S. at 610.

avoids unnecessary confrontations between the legislative and judicial branches and preserves legitimate governmental interests served by statutes that are challenged.[145] In addition, it promotes careful and reasoned constitutional decision-making based on a concrete and full-bodied factual record.[146] The Court recently emphasized these points in rejecting a First Amendment overbreadth challenge:

> "By focusing on the factual situation before us, and similar cases necessary for the development of a constitutional rule, we face 'flesh-and-blood' legal problems with data 'relevant and adequate to an informed judgment.' "[147]

The overbreadth doctrine represents "one of the few exceptions" to this general rule.[148] The doctrine is predicated on the sensitive nature of protected expression; it rests on " 'a judicial prediction or assumption that [a] statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.' "[149]

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[145] *See Broadrick v. Oklahoma*, 413 U.S. at 610-11; *United States v. Raines*, 362 U.S. 17, 21-22 (1960).

[146] *New York v. Ferber*, 458 U.S. at 768; *see Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976) (declining, "in the absence of an adequate and full-bodied record," to adjudicate constitutionality of challenged statute "in all of its conceivable applications"); *United States v. UAW*, 352 U.S. at 591 (1957) (referring to "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision").

[147] *New York v. Ferber*, 458 U.S. at 768 (quoting Frankfurter & Hart, *The Business of the Supreme Court at October Term 1934*, 49 Harv. L. Rev. 68, 95-96 (1935)); *id.* at 780-81 (Stevens, J., concurring).

[148] *New York v. Ferber*, 458 U.S. at 768.

[149] *Members of the City Council v. Taxpayers for Vincent*, 52 U.S.L.W. at 4597 (quoting *Broadrick v. Oklahoma*, 413 U.S. at 612).

Application of the overbreadth doctrine, "like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted."[150] "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."[151] Rather, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."[152] Moreover, the use of overbreadth analysis has been rejected as inappropriate where, as here, the challenged statute is designed to promote, rather than restrict, First Amendment values.[153]

In *Broadrick v. Oklahoma*, the Court rejected an overbreadth challenge to a statute that prohibited state employees from engaging in a wide range of political activities. The Court acknowledged that some applications of the statute—including a purported ban on the display of political buttons or bumper stickers—might be constitutionally impermissible; but it rejected appellants' claim that the statute "must be discarded *in toto* because some

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[150] *New York v. Ferber*, 458 U.S. at 769; *see id.* at 768 (application of overbreadth doctrine "must be justified by weighty countervailing principles") (quoting *United States v. Raines*, 362 U.S. at 22-23).

[151] *Members of the City Council v. Taxpayers for Vincent*, 52 U.S.L.W. at 4597; *see Secretary of State v. Munson*, No. 82-766 (U.S. June 26, 1984) (Rehnquist, J., dissenting).

[152] *Id.* at 4598; *see, e.g., New York v. Ferber*, 458 U.S. at 768 (quoting *United States v. Raines*, 362 U.S. at 22-23).

[153] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969); *United States v. Harriss*, 347 U.S. 612, 626 (1954); *see generally Note, The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 920 (1970).

persons' arguably protected conduct may or may not be caught or chilled": [154]

> "[T]here comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." [155]

Last Term, in *Members of the City Council v. Taxpayers for Vincent*,[156] the Court followed *Broadrick* in rejecting an overbreadth challenge to an ordinance that prohibited the posting of any signs—including political signs—on public property. The Court found that the challenged ordinance served important municipal interests in promoting safety and "eliminating visual blight" and held that "[a]ppellees ha[d] simply failed to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court." [157] The Court reached a similar conclusion in rejecting an overbreadth challenge to an anti-pornography statute in *New York v. Ferber*.[158]

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[154] 413 U.S. at 618.

[155] *Id.* at 615 (citations omitted). *Accord, Parker v. Levy*, 417 U.S. 733, 759-60 (1974); *CSC v. National Association of Letter Carriers*, 413 U.S. at 580-81.

[156] 52 U.S.L.W. 4594 (U.S. May 15, 1984).

[157] *Id.* at 4598.

[158] 458 U.S. at 769-70. The Court's recent decision in *Secretary of State v. Munson*, No. 82-766 (U.S. June 26, 1984), deals with an entirely different situation. In *Munson*, the Court reaffirmed the principle that a statute should not be invalidated as facially overbroad "simply because of the possibility that it might be applied in

These cases counsel against administering the "strong medicine" of the overbreadth doctrine to invalidate section 9012(f)(1). Like the provisions upheld in *Broadrick* and *Taxpayers for Vincent*, section 9012(f)(1) serves significant and legitimate governmental purposes in a broad range of constitutionally permissible applications.[159] Striking down the statute on its face would therefore frustrate Congress' legitimate will to a significant and unwarranted degree. It would also compromise the important First Amendment values served by the Fund Act.

The district court's conclusion that section 9012(f)(1) is fatally overbroad rests on precisely the sort of speculation and conjecture that this Court has found insufficient to sustain First Amendment overbreadth challenges in other contexts. The record below contains scant, if any, adjudicative facts concerning the effect of section 9012(f)(1) on political committees other than appellees and the three similar large-scale committees that operated in 1980. The district court did not refer to any such evidence in its opinion. There is thus no evidence in the record sufficient to invalidate "a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." [160] While it may be possible that, even in the absence of a factual record, "one can conceive of

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an unconstitutional manner." Slip op. at 16. The Court concluded that the statute there at issue should be invalidated because:

> "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that *in all its applications*, it operates on a fundamentally mistaken premise . . . ." *Id.* at 18 (emphasis added).

[159] The district court found that at least some large and professionally managed independent expenditures present real risks of actual and apparent corruption. *Democratic Party v. NCPAC*, 578 F. Supp. at 802, 831, 837-38.

[160] *United States v. Harriss*, 347 U.S. at 626.

some impermissible applications of" section 9012(f)(1),[145] "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied."[146]

Invalidation of section 9012(f)(1) on the basis of the statute's hypothetical application to situations not before the Court would be particularly inappropriate, because any person (including a political committee) may obtain from the Federal Election Commission an Advisory Opinion regarding the applicability of any provision of the Fund Act (or the FECA) to a proposed activity or expenditure.[147] The availability of an Advisory Opinion dissipates the potential for any chill on the exercise of protected First Amendment rights that might otherwise be induced by section 9012(f)(1)'s asserted overbreadth. As one court has stated:

> "When a means like this one is available to reduce uncertainty or narrow the statute's reach and that means can be pursued at little risk to the rights asserted, the chill induced by facial vagueness or overbreadth is *pro tanto* reduced."[148]

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[145] *Members of the City Council* v. *Taxpayers for Vincent*, 52 U.S.L.W. at 4597.

[146] *Broadrick* v. *Oklahoma*, 413 U.S. at 615-16, quoted in *New York* v. *Ferber*, 458 U.S. at 773-74; *see Buckley* v. *Valeo*, 424 U.S. at 68-74 (rejecting facial overbreadth challenge to reporting and disclosure requirements of FECA in favor of case by case adjudication); *cf. Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) (holding state campaign reporting and disclosure requirements unconstitutional as applied to unpopular minor party).

[147] 2 U.S.C. § 437f. The Commission must issue its Opinion, in writing, within 60 days after receiving the request. *Id.* Reliance on an Advisory Opinion issued by the Commission is a defense to criminal prosecution or civil suit. 2 U.S.C. § 437f(c)(2).

[148] *Martin Tractor Co.* v. *FEC*, 627 F.2d 375, 386 (D.C. Cir.), *cert. denied*, 449 U.S. 954 (1980); *see CSC* v. *National Association of Letter Carriers*, 413 U.S. at 580 ("It is also important in

The "strong medicine" of the overbreadth doctrine is, therefore, unnecessary in this context to eliminate any theoretical chill assertedly worked by section 9012(f)(1). Because that statute serves important congressional purposes in a broad range of constitutionally permissible applications, invalidating it on overbreadth grounds "is not merely 'strong medicine,' but 'bad medicine.'"[149]

CONCLUSION

For these reasons, the Court should sustain the constitutionality of section 9012(f)(1).

Respectfully submitted,

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this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission . . . .").

[149] *Secretary of State* v. *Munson*, Slip op. at 1 (Rehnquist, J., dissenting) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. at 613).

AMICUS CURIAE

BRIEF

Nos. 83-1032
and 83-1122

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In the Supreme Court of the United States

October Term, 1983

FEDERAL ELECTION COMMISSION,
Appellant,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,
Appellees.

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL.,
Appellants,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF AMICI CURIAE, GULF & GREAT PLAINS LEGAL FOUNDATION AND HOUSTON POLITICAL ACTION COMMITTEE, IN SUPPORT OF APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF AMICI CURIAE, GULF & GREAT PLAINS LEGAL FOUNDATION AND HOUSTON POLITICAL ACTION COMMITTEE, IN SUPPORT OF APPELLEES

INTEREST OF AMICI CURIAE

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the protection of individual and

constitutional rights, the preservation of the free enterprise system, and the promotion of limited government. In pursuance of these goals, the Foundation is profoundly concerned with any attempt to place limits on political free speech in connection with presidential election campaigns. The Foundation furthers its goals by conducting original litigation, filing of amicus curiae briefs, participating in administrative proceedings, and engaging in other legal activities. It has appeared as amicus curiae in a number of cases before this Court, including First Amendment matters. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981). It has also conducted original, precedent-setting litigation to advance First Amendment jurisprudence. *Country Hills Christian Church v. Unified School District No. 512*, 560 F.Supp. 1207 (D. Kan. 1983).

Amicus Houston Political Action Committee, commonly known as HOUPAC, is a political action committee registered with the Federal Election Commission. HOUPAC raises money from voluntary donations to disburse in conjunction with federal election campaigns in accordance with applicable law. It is thus subject to the limit on independent expenditures imposed by 26 U.S.C. § 9012(f), the constitutionality of which is at issue in this case.

Both Gulf & Great Plains Legal Foundation and HOUPAC appeared as amici in support of the Appellees' Motion to Affirm which was filed previously in this case.

SUMMARY OF ARGUMENT

26 U.S.C. § 9012(f)—the statute which Appellants sought to have declared constitutional in this case—is clearly unconstitutional under the analysis in *Buckley v.*

Valeo pertaining to independent expenditures. The $1,000 limitation imposed by § 9012(f) is, in practical terms, equivalent to an outright ban on independent expenditures, and thus severely burdens political expression which is at the heart of the First Amendment's protection.

Though the Appellants repeatedly refer to the alleged "dangers" and "corrosive effects" of political committees, the record is virtually devoid of any significant evidence that political committees have been the cause of corruption. Thus, the District Court's finding of a lack of corruption should be sustained. Mere allegations that there is a possibility of an appearance of corruption are not sufficient to justify the severe burdens on freedom of speech and association which § 9012(f) imposes. Independent expenditures by political committees do not lend themselves to creating corruption, and the absence of any proof of corruption confirms this Court's initial assessment in *Buckley* that they do not.

Allegations that the activities of certain political committees have not been truly "independent" are irrelevant to this case. The problem of "coordinated expenditures" is handled by other statutes. Furthermore, the FEC, after a two and half year investigation, turned up insufficient evidence to take any action.

Though the Appellants assert that enforcement of § 9012(f) would not significantly affect First Amendment rights, those assertions are belied by the arguments which they adduce against political committees. The premise of their argument concerning the potential for corruption is that the speech of political committees must be highly effective. In addition, Appellants argue that silencing of political committees will lead only to a re-channeling of political speech to the local level. The concept that gov-

ernment may restrict the speech of some persons in our society to cultivate that of others is foreign to the First Amendment, and has been rejected by this Court. Furthermore, suppression of speech by political committees would remove one of the few effective means that the citizen has to make his voice heard on the national level without going through the major political parties. This diversity is to be cherished, not suppressed.

The definitions of "political committee" contained in the relevant statutes are exceedingly broad, and § 9012(f) could thus have a major impact upon groups other than those which raise money from the general public. Though the FEC has adopted a somewhat more restrictive definition, there are dangers inherent in any system of government financing of elections, and the First Amendment rights of groups of citizens engaging in political free speech should not be made to depend upon bureaucratic decision-making.

ARGUMENT

I. The Rights of Political Free Speech and Political Association at Stake in This Case Are at the Heart of the First Amendment's Protection, and Cannot Be Balanced Away by the Interests Asserted by Appellants.

At issue in this case are two fundamentally different conceptions of the nature of our electoral process and constitutional system. Historically, no right has been considered more valuable than the right of the people to associate, pool their resources, and by communications to the public advocate the election or defeat of a presidential candidate. Our institutions and laws, and the

decisions of this Court, have always recognized and jealously guarded these rights to political free speech and association. Appellants, on the other hand, contend that if a group of Americans freely obtain the financial support of their fellow citizens, and use that support to advocate the election of a candidate for President, this activity ought to be considered a federal crime, subject to fines and imprisonment.

Perhaps the most eloquent statement of the centrality of free speech to the continued vitality of our political system was provided by Justice Brandeis. It is familiar to this Court, but it cannot be repeated too often:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imag-

ination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. • • •

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, *J.*, joined by Holmes, *J.*, concurring).

The type of political discussion which Justice Brandeis regarded as indispensable to the discovery and spread of political truth is at stake in this case. Professor (now Judge) Robert Bork defined "explicitly political speech" as "speech about how we are governed," and stated that it "therefore includes a wide range of evaluation, criticism, electioneering, and propaganda." Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 28 (1971). Not only is "electioneering" obviously a species of "political" speech, it is probably the single most important kind. As this Court stated in a case striking down a libel judgment arising from statements made in a political campaign:

> [If] it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971).

Indeed, like the right to vote, the right of the citizenry freely to make known facts and opinions about candidates regarding whom they are called upon to vote is a "fundamental political right, because preservative of all rights." *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

26 U.S.C. § 9012(f) is designed to bring political free speech by political committees to a screeching halt. Its terms impose a $1,000 limitation on independent expenditures for that purpose, but such a limitation in its practical effect is the same as an outright ban. In *Buckley*

v. *Valeo*, 424 U.S. 1, 39-51 (1976), this Court held that a virtually identical limitation on independent expenditures by individuals and groups was flatly unconstitutional, since it "heavily [burdened] core First Amendment expression." *Id.* at 48. The constitutional reasoning and policy arguments upon which the Court relied in *Buckley* —even the exact language of that decision—apply directly to the independent expenditure limitation contained in § 9012(f).

Appellants and amicus Common Cause, however, contend that the First Amendment, far from being the shield for the free and fearless discussion favored by Justice Brandeis, instead provides little or no protection to the speech at issue here. The brief of the Democratic Party, particularly, lays great stress on the argument that First Amendment rights are not absolute, and that such rights must always be "balanced" against other interests. Brief for Appellants Democratic Party of the United States and the Democratic National Committee at 9 (hereinafter, "Brief for Democratic Party"). What grave evils have been shown in this case—what "emergency" exists, to use Justice Brandeis' word—sufficient to justify a major suppression of core political speech?

The briefs of Appellants are replete with foreboding language suggesting the sinister and corrupting power of political committees. The Democratic Party calls the activities of political committees "dangerous and pernicious" and states that they are a "dangerous organizational form" which deserves to be singled out for special regulation. Brief for Democratic Party at 39. The FEC argues that the District Court's holding removes the ability to deal with "abuses in campaign financing" that "menace the integrity" of our government. Brief for Appellant Federal Election Commission at 40. Political

committees, in their view, are a "danger to the election system." *Id.* at 28. Common Cause believes that the First Amendment does not protect speech by Appellees because the restrictions are imposed to obviate "serious public evils." Brief of Common Cause at 21. Common Cause further cites the "corrosive effects" of political committees, calls them a "threat," and states that they are "uniquely potent vehicles for acquiring improper political influence • • •." *Id.* at 19, 26. The Democrats say that the independent efforts of political committees "are the quid that will later demand a quo." Brief for Democratic Party at 39. In fact, references to alleged *quid pro quos* recur with considerable regularity. *See, e.g.*, Brief for Appellant Federal Election Commission at 27; Brief of Common Cause at 8, 18.

But when they get down to particulars, Appellants come up embarrassingly short of facts. The portion of the Democratic Party's brief which is devoted to these alleged *quid pro quos* consists of one paragraph. Brief for Democratic Party at 32. The relevant portion is worth reproducing in full:

> It has been reported in the press that several Cabinet members have held "off the record" and confidential policy briefings for NCPAC contributors. For its largest contributors, NCPAC succeeded in getting a full day's briefing with the President and his aides. *Id.*

To this catalogue of horrors, Common Cause adds the fact that NCPAC produced a film which "President Reagan liked • • • so well that he telephoned NCPAC Chairman Dolan to offer his congratulations." Brief of Common Cause at 17. Common Cause then concludes triumphantly that "That call should eliminate any doubt

that 'independent' expenditures by unauthorized political committees can be *helpful* to a candidate, are noticed by the candidate, and *inspire the candidate's gratitude.*" *Id.* It is unsurprising that the District Court found that on the record in this case, "there is nothing even remotely resembling corruption involved." *Democratic Party of the United States v. National Conservative Political Action Committee*, 578 F.Supp. 797, 828 (E.D.Pa. 1983).

Faced with this spectacular lack of supporting facts, Appellants beat a strategic retreat. Section 9012(f) is said to be a "prophylactic" measure. The measure can be sustained, they say, as a means of preventing the possible appearance of corruption. No proof is therefore required. In support of this position, they cite *Buckley v. Valeo*, 424 U.S. 1 (1976). *See, e.g.*, Brief of Appellant Federal Election Commission at 9; *see also* Brief of Common Cause at 37.

But here Appellants ignore the *clear* distinction which the Court drew in *Buckley* between limitations on contributions, and limitations on independent expenditures. Their citations to *Buckley*, mentioned above, are to the Court's discussion of contributions, not independent expenditures. It is easy to see how large campaign contributions could present a significant possibility of corruption, even though this will not materialize in many cases. But it is very difficult to see how independent speech, especially when funded by thousands of small contributions, would have that effect.

The *Buckley* Court recognized this essential difference when it invalidated 18 U.S.C. § 608(e)(1), which contained an identical limitation on independent expenditures:

> [T]he independent *advocacy* restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. * * * § 608 (e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. * * * The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608 (e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse. *Buckley v. Valeo*, 424 U.S. at 46-47.

This Court thus concluded in 1976 that any potential for corruption posed by independent expenditures was *wholly* insufficient to justify the severe restrictions on core First Amendment rights created by a $1,000 limitation. In the eight years which have followed, Appellants have been unable to point to any substantial abuses to change that assessment. Consequently, this Court should adhere to its original decision, and decline to chase after the phantoms of "possibilities," "appearances," "prophylaxis," and "potentials" which have not materialized and show no signs of doing so.

In the absence of any proof of corruption, or even of any persuasive reason to believe that independent expenditures are likely to lead to corruption, Appellants shift ground again. They complain instead that the independent expenditures by certain political committees were

not really "independent," and produce a variety of newspaper articles, quotations from *The New Yorker*, and other rather tenuous (and largely hearsay) evidence to support this contention. Brief for Democratic Party at 29-30. Such arguments are irrelevant. If the expenditures are not independent, they are "coordinated expenditures" and should be treated as contributions to the candidate under 2 U.S.C. § 441a(a)(7)(B)(i). This Court dismissed out of hand a similar argument when it was presented in *Buckley*:

> [The parties supporting the independent expenditure limitation] argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608 (b)'s contribution ceilings rather than Section 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. *Buckley* v. Valeo, 424 U.S. at 46-47.

Furthermore, had there been illegal "coordination" between political committees and a presidential campaign, the FEC had the chance to prove it. Common Cause and the Carter-Mondale Re-election Committee filed complaints with the FEC in 1980, alleging illegal coordination by five political committees, including Appellees. The FEC investigated for two and a half years, and came up dry. When it declined to pursue the matter, the General Counsel's Office of the FEC issued a report containing ominous rumblings about "questions [having] been

raised", and it refused to issue a finding of no probable cause. The stated reason for dropping the investigation was that it "could involve" a "substantial commitment of resources." *See* Brief of Common Cause at 16-17. Instead, in May of 1983, the same month in which the FEC declined to prosecute, the Democratic Party filed this suit, and was quickly joined by the FEC and Common Cause as intervenor and amicus curiae, respectively. In other words, following a two and a half year investigation which did not establish a violation by these political committees, the FEC decided it did not have the resources to pursue the matter further. It did, however, have the resources to litigate this suit, which invites this Court to conclude on the basis of a few hearsay press reports what the FEC could not prove by solid facts. The Court should decline the invitation.

In fact, all of the principal grounds raised by Appellants which are alleged to justify § 9012(f)'s suppression of speech were raised and rejected in *Buckley*. Appellants therefore seek to distinguish political committees from the broad class of individuals and groups for which *Buckley* struck down § 608(e)(1)'s independent expenditure limitations. Yet the policy arguments advanced have no greater force as applied to political committees than they do for individuals and other groups. To the extent that "coordinated expenditures" are considered to be a problem, this issue would exist equally with respect to individuals and other types of groups. To the extent that *quid pro quos* are considered to be a risk, the risk is probably greater with respect to individuals than it is with respect to political committees. There is very little that a President can do to directly benefit a political committee since it has no economic interests of its own.

The chance that a President would corruptly attempt to confer illegal benefits on contributors to political committees is also small, since the larger committees tend to have hundreds or thousands of contributors, and each contributor is limited to a $5,000 contribution.

Individuals, on the other hand, would be better situated to receive a benefit were a President inclined to confer one. Since an individual may expend an unlimited amount of funds independently, he may also be in a better position to demand such a benefit. The position of the Democratic Party in this respect is interesting. After attempting to show that the management of NCPAC is tightly centralized, they state that "in an important sense, NCPAC is one person and one person only, John T. Dolan." Brief of Democratic Party at 16. If Mr. Dolan were a millionaire, there is no question that under existing law he could make exactly the kinds of independent expenditures which NCPAC makes. The Democrats concede that the right of an individual to make independent expenditures is unlimited. *Id.* at 13. Yet they are attempting to convince this Court that such expenditures are somehow *more* "corrupting" when they are the result of voluntary donations by thousands of predominantly small contributors to a political committee. In such a situation, the potential for corruption is vastly less, not greater, and this Court's ruling in *Buckley* should be reaffirmed.

II. If § 9012(f) Is Upheld, It Will Result in a Major Suppression of Core Political Speech.

The Democrats have adopted the astonishing position that "Section 9012(f) does not foreclose effective speech." Brief for Democratic Party at 18; *see also id.* at 19 n.58 ("there is absolutely no record evidence that meaningful speech has been foreclosed.").[1] The FEC contends that § 9012(f) "does not interfere with the freedom of citizens to engage in political speech and participate in presidential campaigns," and that it "does not significantly trench upon core First Amendment rights." Brief of Appellant Federal Election Commission at 5. Common Cause also placidly maintains that "Section 9012(f)(1) does not unduly interfere with the exercise of First Amendment freedoms." Brief of Common Cause at 37; *see also* id. at 19 ("Section 9012(f)(1) does not unnecessarily interfere with the exercise of speech or associational freedoms by anyone. It leaves everyone free to speak and associate effectively in presidential campaigns.").

On the other hand, Appellants and Common Cause assert that independent expenditures by political commit-

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1. It is true, of course, that several political committees have been active in making independent expenditures, despite the risks and uncertainties created by § 9012(f). Apparently, this is what the Democrats mean when they say that no "meaningful speech has been foreclosed." It is impossible to estimate the quantity of speech by other political committees which might have occurred had § 9012(f) not been on the books. Though on page 19 of their brief the Democrats blandly assert that no meaningful speech has been foreclosed, on pages 4 and 5 they complain that several political committees, including Appellees, have operated in "open defiance" and "continued defiance of the law" in the 1980 and 1984 elections. This characterization is inaccurate, since two District Courts have declared § 9012(f) unconstitutional, and in the first instance the District Court's decision was affirmed by this Court. *Common Cause v. Schmitt*, 512 F.Supp. 489 (D.D.C. 1980) *aff'd by an equally divided court*, 455 U.S. 129 (1982); *Democratic Party of the United States v. National Conservative Political Action Committee*, 578 F.Supp. 797 (E.D.Pa. 1983). These political committees could also reasonably have relied upon the analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976), holding limitations on independent expenditures to be unconstitutional. But the Democrats cannot have it both ways, first complaining that these political committees have defied the law, and then claiming that § 9012(f) has not foreclosed their speech. If the constitutionality of § 9012(f) were to be upheld by this Court, large quantities of effective political speech would clearly be foreclosed.

tees would "swamp the public grant," nearly eighty million dollars in 1984. Brief of Common Cause at 32. The amounts of money raised by political committees are so large, according to the Democrats, that candidates may be forced to abandon public funding. Brief of Democratic Party at 38. Political committees have the ability "to influence the outcome of presidential elections," and are a "new, rich and powerful source of campaign support." *Id.* at 11. They are "a vehicle to intimidate elected officials," and can cause the "wholesale evasion" of the plan for public funding of Presidential elections. *Id.* at 25, 31.

Which is the case? Would enforcement of § 9012(f) result in no suppression of effective speech, or would it eliminate these extremely potent political committees? The only manner in which these political committees can affect the electoral process is by engaging in effective political speech. Otherwise, the effect of their expenditures would be a nullity. Appellants' entire argument in this case is predicated upon the premise that political committees are engaging in large amounts of highly effective political speech. The conclusions that they draw from this premise are erroneous, but let us not hear them contend that effective political speech would not be suppressed by enforcement of § 9012(f). As this Court has recognized, "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates." *Buckley v. Valeo*, 424 U.S. 1, 38 (1976).

But Appellants are unconcerned about this suppression of speech since, they argue, there are other channels open for public discussion. They especially emphasize that individuals and other types of groups are not affected by § 9012(f). Brief for Democratic Party at 13; Brief for Appellant Federal Election Commission at 36; Brief of Common Cause at 34-35. This argument sits rather ill coming from the FEC and Common Cause, since in 1976 both of those organizations vigorously attempted to uphold the provision which would have clamped the same $1,000 lid on individuals and other groups. Brief for Appellees Center For Public Financing Of Elections, et al. [including Common Cause] at 88-101, 154-162, *Buckley v. Valeo*, 424 U.S. 1 (1976); Brief for the Attorney General and the Federal Election Commission at 54-56, *Buckley v. Valeo*, 424 U.S. 1 (1976). With this caveat, let us examine how the Appellants would have political speech re-channeled and re-directed in American elections for President.

The Democrats, particularly, seem to have a very clear conception of how Americans will participate in Presidential campaigns after political committees are silenced. At pages 17-21 of their Brief, they analyze the "replacement" for the speech of political committees in considerable detail. As a replacement for a twenty-thousand dollar message by a political committee using a single medium, the Democrats conjure up the image of "a thousand different twenty-dollar messages in various forms of media in various locations all across the country." In other words, for every Terry Dolan who is put out of circulation, thousands of little Terry Dolans will spring up across the country to purchase quarter-page ads in the local newspaper. They tell us in detail of the per agate line charges for the *Easton Star-Democrat*, the *Hazelton-Standard Speaker*, *The Harrisburg Patriot News*, and *The Camden Courier Post*, among others. If individuals do not have the funds to "purchase an entire television spot or an appropriate amount of newspaper space," the Democrats assure us that they may pool their resources to do so.

Apart from the palpable absurdity of this scenario, there is something more deeply disturbing about it. The Democrats casually assert that "Thousands of independent messages are, in any event, of *greater First Amendment value*" than the speech of a political committee. *Id.* at 19. "Greater First Amendment value," indeed. According to whom? The notion that political speech by one group or individual is of "greater First Amendment value" than speech by another is a notion that has always, thankfully, been alien to our constitutional system. As this Court stated in *Buckley* v. *Valeo*, 424 U.S. at 48-49:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" [Citations omitted] The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend upon a person's financial ability to engage in public discussion. [Citation omitted]

The Brief for the Democratic Party also refers to political committees as an "increasingly powerful, uncontrollable force." Brief for Democratic Party at 6. Again, the concept that political speech in conjunction with Presidential campaigns is supposed to be somehow "controlled" has never formed a part of the political philosophy on which our institutions are based. Instead, as this Court has stated, we have always had "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-

open * * *." *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

The Brief of the FEC also contains some peculiar notions regarding the nature of our political process. At page 28, the FEC argues that expenditures by political committees might cause the candidate's publicly funded campaign to be "subordinated to the campaign activities of unaccountable, unauthorized political committees." *Unaccountable* to whom? To the candidate? It is the essence of an independent committee that it is not accountable to a candidate. To the voters? The voters surely will make up their own minds. To their contributors? Contributors have an extremely effective sanction, the withholding of money. To the government? Our system of free speech and free elections is predicated on the assumption that one may speak on political matters without being held "accountable" to the government, or for that matter, to any one else. The FEC's concept of political participation is also revealed on Page 5 of their Brief. After stating that § 9012(f) does not interfere with the freedom of citizens to engage in political speech and participate in presidential campaigns, the FEC asserts that "to the contrary, the statute's tax return check-off system provides a new opportunity for millions of Americans to participate in the financing of Presidential campaigns." Somehow, we find it hard to believe that this is the type of vigorous political participation Justice Brandeis had in mind in his concurrence in Whitney.

The Briefs of Appellants and Common Cause all offer helpful explanations of what citizens will still be allowed to do politically when the political committees which they have supported are no longer allowed to advocate the election or defeat of a Presidential candidate. Brief for

Appellant Federal Election Commission at 35-37; Brief for Democratic Party at 17-20; Brief of Common Cause at 37-39. Some of these are unlikely to be very effectual or reasonably available to the citizen. Common Cause, for instance, suggests that individuals acting on their own might buy local billboard space in support of a Presidential candidate, or prepare, reproduce and distribute handbills. Brief of Common Cause at 38. It is interesting to note that virtually all of the means left open to the private citizen which are likely to be reasonably available and effective require contributions to or some form of participation in the organized political party system. One of the great advantages of political committees is that they have presented viewpoints which have not been expressed by the two major parties. The adding of effective political voices to the debate on a national level is a valuable function which should not lightly be suppressed. This principle was recognized in *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957). Speaking for the Court, Chief Justice Warren stated that:

> Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of politica associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. *Id.*

Section 9012(f) directly and seriously injures the rights of political committees to political expression. But § 9012(f) is not limited by its terms to groups which solicit money from the public and then make independent expenditures, as opposed to groups of individuals who "pool" their own money. The two relevant definitions of "political committee" are extremely broad. The definition in 26 U.S.C. § 9002(9) includes "any committee, association or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elected public office." The definition in 2 U.S.C. § 431(4) includes, *inter alia*, "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year * * *." By their terms, therefore, these definitions clearly include virtually any group which might make independent expenditures. The distinction between groups which collect contributions from others and groups which use money only from their members is not contained in the statute. Instead, as the Brief of the FEC makes clear, this distinction results only from an Advisory Opinion of the FEC itself. Brief of Appellant Federal Election Commission at 34. The FEC thus feels the need to assure us:

> The Commission has not sought to apply section 9012(f) in a manner inconsistent with this distinction.

> Thus, so long as the Commission's exclusive jurisdiction to enforce the Fund Act is preserved * * *, there is no reason why groups of individuals should be deterred from engaging in joint political expression merely because of the existence of section 9012(f). *Id.*

While this is certainly reassuring, fundamental rights of free speech and freedom of association in national elections should not be made to depend upon Advisory Opinions of bureaucratic agencies. The First Amendment, as construed by this Court, provides a better guarantee.

The FEC itself has not always been so reassuring. In its Brief in the *Buckley* case the FEC included the following statement in a discussion of "Public financing and the First Amendment":

> To be sure, one can argue, as a matter of policy or political philosophy, that it is "dangerous" to make federal elections dependent on public money, because the government—presumably the incumbent Administration—will then be in a position, albeit illegally, to manipulate the outcome. We could retort that it is safer to place that power of the purse in governmental hands than in the hands of aggregated private wealth. But, constitutionally, those considerations are irrelevant. Brief for the Attorney General and the Federal Election Commission at 64, *Buckley v. Valeo*, 424 U.S. 1 (1976).

That statement is really rather breathtaking. We are confident that this Court, unlike the FEC, is fully sensitive to the profound constitutional issues presented by public financing of elections as opposed to private financing. One of those issues is, of course, the very serious risk that parties or persons in power, and in control of the election process,

will seek to stifle debate. Section 9012(f), if upheld, would silence effective and legitimate voices on the national political scene. Rather than having the FEC or anyone else decide who may speak and who may not, we urge this Court to adopt instead the approach of Mr. Justice Holmes that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the citizens'] wishes can be safely carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting). Justice Holmes believed that "that at any rate is the theory of our Constitution." *Id.* The theory is still valid, and the attempt to remove the voices of political committees from the marketplace of ideas during presidential elections should not be countenanced.

CONCLUSION

For the reasons above stated, the decision of the District Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Nos. 83-1032 & 83-1122

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In The

Supreme Court of the United States

October Term, 1983

Federal Election Commission,

Appellant,

v.

National Conservative Political Action Committee, *et al.*,

Appellees.

Democratic Party of the United States, *et al.*,

Appellants,

v.

National Conservative Political Action Committee, *et al.*,

Appellees.

On Appeals from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF THE
NATIONAL CONGRESSIONAL CLUB
AS *AMICUS CURIAE*

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QUESTION PRESENTED

Whether Congress may prohibit individuals from jointly spending more than $1,000 through a political committee to further the election of a publicly financed presidential or vice presidential candidate where such expenditures are not made in cooperation or consultation with the candidate or his agents.*

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* The Court need not decide this First Amendment question if, as we urge, it concludes that the statute at issue was not intended to limit independent expenditures. See page 2, note 1, and pages 34-47, below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-1032 & 83-1122

FEDERAL ELECTION COMMISSION,
Appellant,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,
Appellees.

DEMOCRATIC PARTY OF THE UNITED STATES, *et al.*,
Appellants,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,
Appellees.

On Appeals from the United States District Court for the Eastern District of Pennsylvania

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BRIEF OF THE NATIONAL CONGRESSIONAL CLUB AS *AMICUS CURIAE*

Pursuant to Rule 36.2 of the Rules of this Court, the National Congressional Club submits this brief as *amicus curiae*. Letters consenting to the filing of this brief have been obtained from the parties and filed with the Clerk of the Court. Leave was granted to file a brief of not more than 50 pages.

INTEREST OF THE NATIONAL CONGRESSIONAL CLUB

The National Congressional Club ("NCC") is an unincorporated political committee whose purpose is to promote the conservative philosophy of government by supporting conservative candidates for public office and legislation furthering conservative goals. Formed in 1973 and based in Raleigh, North Carolina, NCC supports candidates for public office through contributions, independent expenditures, and issue-oriented educational programs. Financial support for conservative candidates is raised from among more than 100,000 members and non-member contributors. The average contribution is $20 to $30.

NCC's members and non-member contributors exercise control over its agenda. From members, funds are solicited for a designated series of specific political projects; from non-member contributors, funds are solicited for individual projects on an *ad hoc* basis. Those projects that member and non-member contributors are unwilling to fund cannot be pursued. NCC made substantial independent expenditures in support of Governor Reagan in 1980 during the presidential primary and general election campaigns and intends to make such expenditures in support of President Reagan's re-election campaign this year.

Because the FEC currently takes the position that independent expenditures by political committees are subject to the expenditure limitation imposed by the Presidential Election Campaign Fund Act, 26 U.S.C. § 9012(f), NCC has a direct and vital interest in this case. In particular, it has an interest in this Court's construing § 9012(f) not to apply to independent expenditures or affirming the district court's holding that, so construed, § 9012(f) violates the First Amendment.[1]

[1] Even though appellants have not addressed the issue of § 9012(f)'s proper construction, the Court may consider the issue "[r]ather than decide a constitutional question when there may be doubt whether there is any statutory basis for it." *Fry* v. *United States*, 421 U.S. 542, 545 n.5 (1975). *See also United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

STATEMENT OF THE CASE

1. At issue in this case is the facial validity of a campaign-expenditure limitation established in 1971 by the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. § 9012(f). As interpreted by the FEC, § 9012(f) forbids individuals from jointly spending more than $1,000 to further the election of a publicly financed presidential or vice-presidential candidate.[2] Because campaign expenditures made in consultation with (or otherwise coordinated with) such candidates or their agents are subject to a $1,000 limitation under the Federal Election Campaign Act ("FECA"),[3] the operative significance of § 9012(f) lies in its presumed $1,000-limit on "independent" expenditures on behalf of publicly

[2] Section 9012(f)'s limitation applies to expenditures by "political committees" not "authorized . . . with respect to the eligible candidates of a political party for President and Vice President in a presidential election." 26 U.S.C. § 9012(f)(1). A "political committee" is

> "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." *Id.* § 9002(9).

An "authorized committee" is "any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates." *Id.* § 9002(1).

The term "eligible candidates" means the candidates of a political party for president and vice president who have met all applicable conditions for receiving payments under the Fund Act's scheme for public campaign financing. *Id.* § 9002(4). To be eligible for public financing, a major-party candidate must, among other things, certify to the FEC that he and his "authorized" committees will not incur aggregate campaign-related expenses in excess of the amount of the public payment and will not accept private contributions to defray campaign expenses. *Id.* § 9003(b).

Section 9012(f)(2) exempts expenditures by broadcasters regulated by the FCC and periodical publications in reporting news or taking editorial positions, and by tax-exempt § 501(c) organizations in communicating their views to their members.

[3] 2 U.S.C. §§ 441a(a)(1) & (a)(7)(B). These provisions were added to FECA in 1976. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 283, Title I, § 112(2), 90 Stat. 487-88 (1976).

financed presidential and vice presidential candidates.[4] It is the facial validity of § 9012(f), as construed to limit independent expenditures by political committees on behalf of such candidates, that is at issue in this case.[5] This Court held that a similar expenditure limitation violated the First Amendment eight years ago in *Buckley* v. *Valeo*, 424 U.S. 1, 39-50 (1976) (per curiam).[6]

Appellants in No. 83-1122 are the Democratic Party of the United States and the Democratic National Committee, whose presidential and vice presidential candidates—unlike their Republican rivals—have not inspired substantial independent expenditures on their behalf.[7] Appellant in No. 83-1032 is the

[4] The term "independent expenditure," added to FECA in 1976, means

> "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate."

Pub. L. No. 283, *supra*, 90 Stat. 479 (codified as 2 U.S.C. § 431(17)).

[5] We believe that the Court need not construe § 9012(f) to limit independent expenditures, and therefore may avoid the constitutional issue presented by § 9012(f) if construed to apply to independent expenditures. See pages 34-47, below.

[6] The limitation at issue in *Buckley*—Pub. L. No. 443, Title I, § 101(a), 88 Stat. 1265 (1974) (formerly codified as 18 U.S.C. § 608(e)(1))—applied to expenditures in all federal election campaigns. As the Court described it, § 608(e)(1) "prohibit[ed] all individuals, who are neither candidates nor owners of institutional press facilities, and all groups, except political parties and campaign organizations, from voicing their views 'relative to a clearly identified candidate' through means that entail[ed] aggregate expenditures of more than $1,000 during a calendar year." 424 U.S. at 40.

[7] Independent expenditures by individuals and groups urging President Carter's reelection in 1980 amounted to $27,773; independent expenditures by individuals and groups urging Ronald Reagan's election amounted to $10,601,864. *New York Times*, Nov. 29, 1981, § 1, p. 33, col. 1 (summarizing data in *FEC Index of Independent Expenditures 1979-1980* (Nov. 1981)).

Federal Election Commission, which long took the position that § 9012(f) "does not apply to independent expenditures."[8] Two of the FEC's five current members are of the view that § 9012(f)'s limitation, construed to apply to independent expenditures, is "an unconstitutional restriction"[9]; prior to 1980, at least three of its then-seven members, as well as its general counsel, indicated that they were of that view.[10]

The appellees in both cases are the National Conservative Political Action Committee ("NCPAC") and the Fund for a

[8] Following this Court's decision in *Buckley*, the FEC declined to construe § 9012(f) as a limitation on independent expenditures. See, *e.g.*, Letter of Oct. 8, 1976, from FEC Assistant General Counsel Lichfield to Donald Cox, Esq., at 1 (reprinted as Appendix A to this brief), *quoted in* FEC Advisory Opinion ("AO") 1983-10/11, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5716, at 10,975—4 (Aug. 4, 1983) (dissenting opinion of Commissioner Aikens) (making same point). The Commission adhered to this position until July 1980, when it decided to intervene in *Common Cause* v. *Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (3-judge court), *aff'd by an equally divided Court*, 455 U.S. 129 (1982). Because the FEC has done an about-face in construing § 9012(f) to apply to independent expenditures, its construction is entitled to "no special weight." *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 859 n.25 (1975); *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

[9] AO 1983-10/11, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5716, at 10,974 (June 7, 1983) (concurring opinion of Commissioner Elliot); *id.* at 10,975 (Aug. 4, 1983) (dissenting opinion of Commissioner Aikens).

[10] Three Commissioners and the FEC's general counsel expressed this view in 1976 FEC hearings on regulations to implement the Fund Act following this Court's decision in *Buckley*. *See Hearings on Part 140 (General Election Financing) before the Federal Election Comm'n* 11 (July 7, 1976) (remarks of Commissioner Harris) ("Shouldn't . . . [§] 9012(f) be interpreted as permitting independent expenditures?"); *id.* at 21-22 ("If it is a limit on independent expenditures, it is unconstitutional under *Buckley* v. *Valeo*."); *id.* at 17 (remarks of Commissioner Staebler) ("I think we are agreeing that we should not try to get into the range of independent expenditures" in implementing § 9012(f)); *id.* at 48 (limitations on independent expenditures impermissible under *Buckley*); *id.* at 38 (remarks of General Counsel Murphy) (§ 9012(f) must be construed to permit independent expenditures or it is "a Constitutional dead letter"); *id.* at 39 ("If it is truly independent there is an unlimited amount of spending that can go on."); *id.* at 48 (remarks of Commissioner Springer) (expressing agreement with General Counsel Murphy). Commissioner Aikens, who has expressed her view that § 9012(f) is unconstitutional as construed to limit independent expenditures (see note 9, above), was also a member of the FEC at the time.

Conservative Majority ("FCM"). Following a three-year investigation in response to complaints filed by the Carter-Mondale Reelection Committee, the Democratic National Committee, and Common Cause, the FEC's general counsel was able to report no "concrete evidence of cooperation and coordination" between NCPAC or FCM, on the one hand, and authorized Reagan committees, on the other, in the 1980 election.[11] The FEC accepted the general counsel's recommendation against taking further action on such allegations of cooperation and coordination.[12]

The Democrats filed their district-court complaint on May 1, 1983, seeking a declaration that § 9012(f), construed to limit independent expenditures by political committees, is constitutional on its face. Several weeks later, on June 14, 1983, the FEC filed its own complaint, also seeking a declaration that § 9012(f), so construed, is constitutional; in addition, the FEC sought a declaration that the Democrats, as private parties, were not entitled to seek a declaration of § 9012(f)'s constitutionality in the circumstances of this case.

2. A three-judge district court was convened pursuant to 26 U.S.C. § 9011(b)(2). See J.S. App. 13a n.6.[13] After briefing and argument on a record consisting of stipulated facts, affidavits, and other evidence, the district court on December 12, 1983, issued its decision concluding that § 9012(f), on its face, "abridges speech and association protected by the first amendment." J.S. App. 99a. The court's conclusion was grounded in its recognition that campaign-expenditure limitations restrict political expression at the core of the First Amendment, *id.* at 44a, and that limitations on group expenditures for political communications infringe basic associational rights. *Id.* at 46a.[14]

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[11] General Counsel's Report, *In re Ronald Reagan*, MUR 1252/1299, at 6-7 (May 18, 1983) (unpublished).

[12] Certification of Secretary, *In re Ronald Reagan*, MUR 1252/1299, at 1 (May 25, 1983) (unpublished). References to appellants in this brief include Common Cause, which has filed an *amicus* brief supporting the FEC and the Democrats.

[13] "J.S. App." refers to the Appendix to the FEC's Jurisdictional Statement, which reprints the district court's opinion.

[14] The court also held that the Democrats were entitled to sue.

The Court rejected the contention that the First Amendment accords le[illegible] protection to speech by associations of individuals in political committees than to speech by "individuals and entities unregulated by Section 9012(f)." J.S. App. 49a. The very number of individuals who contribute to political committees—101,000 people contributed to NCPAC during the 1979 election cycle alone—persuaded the court of the "efficacy and importance" of their political speech, *id.* at 50a; and, although the court acknowledged that those who contribute to political committees may have little control over the "immediate use" of their money by these committees, it observed that the contributors know that the committees will effectively advocate their views. *Id.* at 51a. As the court stated:

> "These citizens believed that, given the economies of scale inherent in modern advertising, and the abilities of professionals to persuade more powerfully, their voice is louder when spoken by a PAC.
>
> "While we are not saying that 100,000 NCPAC contributors can't be wrong, we will want far more evidence than plaintiffs have begun to offer before we allow even Congress to stifle so many citizens' preferred method of expression. Those who choose to contribute to political committees rather than spend the money themselves are making a mature choice that Congress must respect absent some compelling countervailing consideration. Without irrefutable evidence that these citizens are wrong, or without some compelling countervailing principle recognized by the Supreme Court, we dare not render ineffective their method of expression. In short, we agree with the PACs' contentions that PAC speech is amplified individual speech presumptively entitled to full constitutional protection." *Id.*

Nor was the court impressed with the argument that, because appellees are corporations, the expenditure limitation at issue here is for that reason defensible. The court noted this

Court's recognition that political fund-raising and spending by corporations may pose special dangers of corruption and therefore may warrant specially tailored regulation to protect the integrity of the electoral process. *Id.* at 51a-54a.[15] But the court observed that the purposes for which this Court has held that Congress may impose special restrictions on corporate campaign fund-raising and spending are inapposite in this case, which does not involve corporate campaign contributions from treasury funds or the stockholder-betrayal problem. *Id.* at 54a-57a.[16] Moreover, the court pointed out that § 9012(f) is directed not at corporations as such but at *any* "committee, association, or organization (*whether or not incorporated*)" which spends on behalf of publicly funded candidates. *Id.* at 56a, *quoting* 26 U.S.C. § 9002(9) (emphasis added by the court). *NRWC* makes clear only that an ideological group that organizes itself as a corporation is not necessarily immune from the statutory restrictions that govern corporations generally.[17]

Finally, the court concluded that § 9012(f) could not be justified as a means of preventing corruption of the electoral

[15] Citing *FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982) ("*NRWC*").

[16] The Court in *NRWC* held that restrictions on a corporation's ability to solicit contributions to be used for political purposes were justified on two grounds: (1) to prevent corporations from taking advantage of the "special characteristics" of the corporate form to amass great sums of money which could be used to incur political debts from legislators through corporate contributions; and (2) to protect stockholders who had made their money available to the corporation for one set of purposes from having it used for another. 459 U.S. at 207-08. The district court held that § 9012(f)'s restriction on campaign expenditures by political committees serves neither of these purposes, although some political committees (unlike *amicus* NCC) happen to be corporations.

[17] The FEC does not treat a political committee as a corporation for purposes of its regulations implementing FECA's restrictions on corporate contributions and expenditures "if the organization incorporates for liability purposes only, and if the organization is a political committee as defined in 11 C.F.R. § 100.5." 11 C.F.R. § 114.12(a) (1984). NRWC made no claim that it constitutes a "political committee" within the meaning of the FEC's regulations. There is no dispute that NCPAC and FCM are "political commitees" and are not subject to FECA's restrictions on corporate contributions and expenditures.

process or the appearance of such corruption—"the only legitimate basis for regulating speech resulting from campaign finance." *Id.* at 46a.[18] The court recognized that "new and significant evidence" of a link between independent campaign expenditures and corruption might require reassessment of this Court's conclusion in *Buckley* that any such link is too attenuated to permit restrictions that trench on basic First Amendment rights. *Id.* at 60a. Therefore, it exhaustively canvassed the stipulated record and the "evidence" supplied by appellants. *Id.* at 61a-75a. But the court determined that no link between expenditures and corruption had been shown; and, since § 9012(f) thus could not be justified as serving to prevent corruption or its appearance, the district court held that the statute unjustifiably infringed First Amendment rights.[19]

The district court also professed to find § 9012(f) fatally "overbroad," *id.* at 37a-39a, 93a-99a, but this finding was simply shorthand for its conclusion that § 9012(f) is not "tightly tailored to anti-corruption goals," *id.* at 47a; that § 9012(f) limits far more protected expression and conduct than necessary to serve any purported goal of preventing real or

[18] The court noted that, under this Court's decisions, a campaign-spending restriction may *not* be justified as a means of "equaliz[ing] the ability of all citizens to affect the outcome of elections," J.S. App. 46a, or as a means of "braking rising costs of political campaigns." *Id.* The court also rejected the suggestion that an otherwise-questionable campaign-spending restriction might be justified as a means of reinforcing other, legitimate restrictions: each spending limitation, the court stated, "must be judged on its own." *Id.* at 87a.

[19] The court also suggested that, if § 9012(f) were intended as a "prophylactic measure"—presumably the court was referring to a restriction justified not by a direct or demonstrable link between campaign expenditures and corruption but instead by the possibility of such a link—, the court was bound to examine the persuasiveness of that rationale and to invalidate the law if the rationale could not withstand strict judicial scrutiny. *Id.* at 58a-60a. But the court did not consider Congress's purposes in enacting § 9012(f) and did not find that Congress intended § 9012(f) to serve as a "prophylactic." Its analysis was concerned solely with the existence *vel non* of a direct or demonstrable link between independent campaign expenditures by political committees and real or apparent corruption.

apparent corruption; and that § 9012(f), in doing so, defies the precept that Congress, in curtailing protected activity to serve a compelling interest, may not operate with a bludgeon where a scalpel will do.[20] The district court noted that the dangers against which Congress might legitimately guard—corruption and its appearance—are already addressed by other provisions of the Fund Act and FECA.

SUMMARY OF ARGUMENT

We first present an overview of the case as we see it, and then a summary of our argument.

I.

Although § 9012(f) is said to restrict only the campaign expenditures of political committees and not individuals "acting alone or in informal groups" (CC at 4; FEC at 34; DEM at 15),

[20] As this Court recently noted in *Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 n.13 (1984), "overbreadth" has been used in some cases to describe "a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." Because § 9012(f) restricts *only* protected activity, the FEC's and Common Cause's observations about third-party standing and hypothetical applications of allegedly overbroad laws (FEC at 29-40; CC at 45-49) are not germane. Such issues arise where "overbreadth" is used in its conventional sense to describe a challenge to a statute that burdens protected and unprotected activity alike and a party whose own conduct is unprotected challenges the statute. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973). Assuming a link between independent expenditures and corruption, § 9012(f) is, strictly speaking, overinclusive, not "overbroad," because it is not "tightly tailored to anti-corruption goals." J.S. App. 47a. See *California Medical Ass'n* v. *FEC*, 453 U.S. 182, 203-04 (1981) (Blackmun, J., concurring in part and concurring in the judgment); *First National Bank* v. *Bellotti*, 435 U.S. 765, 794 (1978) (state's proffered purpose in limiting corporate referendum-campaign contributions or expenditures was to prevent the use of corporate resources in furtherance of views with which some shareholders might disagree; limitation held to be overinclusive because it "prohibit[s] a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure").

that distinction is without constitutional significance in this case.[21] The distinguishing characteristic of political committees is that some of them spend large sums of money in support of the candidates they favor and some of them spend it well; as the district court commented, "[t]hat may be why" so many people support them. J.S. App. 78a. Nothing in the record supports the claim that independent expenditures by political committees present any special danger of actual or apparent corruption of the electoral process.

Nor is the true aim of appellants to vindicate any power of Congress to regulate political committees in the interest of preventing corruption. Instead, appellants seek to permit Congress to pursue the two goals that *Buckley* held to be insufficient justifications for restricting First Amendment rights: control of the quantity of private spending in federal election campaigns, and equalization of the relative ability of individuals and groups to influence the outcome of elections. These are the only two goals that § 9012(f) serves.

[21] It is worth noting that, although the FEC suggests that its interpretation of the statutory definition of "political committee" is narrow (FEC at 32 n.22; see CC at 35), it has always maintained that any group will constitute a "political committee" whenever it raises contributions or makes expenditures in excess of $1,000 "for the purpose of influencing an election." AO 1980-106, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5582 (Dec. 23, 1980) (a "loose association" that publishes a summary of positions by candidates Reagan, Carter, and Anderson concerning "Key Moral and Religious Liberty Issues" is a "political committee" if more than $1,000 is spent for publication and distribution); AO 1980-126, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577 (Dec. 22, 1980) (a single individual who solicited contributions and used them to print and distribute pamphlets urging people to vote for Republicans was acting as a "political committee"); AO 1976-51, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5215 (Sept. 2, 1976) (an informal discussion group of individuals who do not pool funds but make personal contributions to candidates who are "the subject of discussion among those individuals" is a "political committee"). Thus, the FEC's bland assurance that "there is no reason why groups of individuals should be deterred from engaging in joint political expression merely because of the existence of Section 9012(f)" (FEC at 34) must be taken with a grain of salt. The Advisory Opinions cited in the FEC's brief at page 32, note 22, offer not one single instance in which a group of individuals spending more than $1,000 to influence an election to federal office has been deemed *not* to be a "political committee."

A holding that Congress may pursue these goals by restricting independent campaign expenditures by political committees would eviscerate basic First Amendment rights. Moreover, such a holding could not logically be limited to restrictions on expenditures by political committees. Individuals "acting alone or in informal groups" can also spend large sums of money in support of the candidates they favor and can also spend it effectively. If the test for whether independent campaign expenditures may be restricted is—as appellants propose—whether they help elect a candidate, then *Buckley* is effectively overruled and core First Amendment rights of association and expression are radically redefined.

The immediate, practical result would be to leave organized support for presidential candidates entirely in the hands of the political parties, "giv[ing] the institutionalized political parties an almost impervious monopoly over the agenda and terms of debate in presidential elect[ion] campaigns." J.S. App. 99a. If citizens cannot combine their resources through political committees to amplify their voices effectively, see *Buckley*, 424 U.S. at 22, then "only those few with control over our major political parties, our institutional press, or with vast individual resources, [will be able] to capture the economies of scale inherent in our national society and thus to be heard above the din of everyday existence." J.S. App. 99a.[22]

This surely cannot be the outcome that the FEC or Common Cause desires (although undoubtedly it would suit the Democrats). It is an outcome that would disable individuals of ordinary means from combining their resources to match those of a Stewart Mott or a Cecil Haden, whose independent advocacy on behalf of a publicly financed presidential candidate (see Jt. Stip. ¶ 167, J.A. 52) this Court in *Buckley* held the First Amendment forbids Congress to limit. Nor, as the district

[22] Such a regime, with its grant of special privileges for the press, cannot be squared with this Court's repeated recognition, in a variety of contexts, that the media enjoy no preferred position under the Bill of Rights. *E.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 681-91 (1972); *Pell* v. *Procunier*, 417 U.S. 817, 834 (1974); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 565-66 (1978); *Calder* v. *Jones*, 104 S. Ct. 1482, 1487-88 (1984).

court noted, could ordinary citizens combine their resources to make their commonly held views known to the electorate at large, much less felt by the presidential candidate and his party, which themselves have many millions of dollars in public funds with which to shape the campaign debate.

Political committees thus play an indispensable role in our political system, whose genius lies in its commitment to the broadest and most open debate by the people in campaigns for elective office. Such associations are the only meaningful counterweights to the organized political parties and the institutionalized media and are the only means by which ordinary citizens can match the resources of wealthy individuals. To stifle their independent advocacy would gratuitously and indefensibly restrict "speech intimately related to the process of governing." *First National Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978), limiting the dissemination of information and constricting the interchange of ideas "at the heart of the First Amendment's protection." *Id.* at 776.

II.

In seeking reversal, appellants make three basic arguments. First, they reject the distinction between expenditures and contributions as a cynical fiction, asserting that the same justification for limiting contributions—preventing corruption or its appearance—justifies expenditure limitations as well. Second, they argue that, even if there is no direct link between independent expenditures and corruption, § 9012(f) should be sustained because Congress intended the law as a "prophylactic" measure to prevent corruption or its appearance, and that the district court erred in "second guessing" that choice. Third, they argue that § 9012(f) is a necessary element of the Fund Act's scheme for public financing of presidential election campaigns and must for that reason be sustained. None of these arguments withstands scrutiny.

1. Appellants' attempt to erase the distinction between expenditures and contributions is grounded in two constitutionally indefensible premises—(1) that a successful candi-

date's recognition and reward of those who supported his campaign through independent advocacy of his cause constitutes "corruption" that justifies other limitations on campaign spending; and (2) that expenditures cannot be considered "independent" if they are consistent with and effectively promote a candidate's campaign, but instead should be treated like contributions.

The first premise is untenable because it trivializes "corruption," transmuting a timeless political truth—that support is rewarded—into a justification for stifling basic First Amendment rights; in so doing, it penalizes speech and association merely for being effective. The second premise is untenable because it, too, penalizes speech and association merely for being effective and because it obliterates the distinction between the First Amendment rights of the candidate and those of his supporters. The three-judge district court painstakingly canvassed the "evidence" proffered by appellants to demonstrate a link between independent expenditures and "corruption" in the accepted sense of that term, and correctly found it insufficient to justify the expenditure ceiling imposed by § 9012(f).

2. Appellants' attempt to cast § 9012(f) as a carefully considered "prophylactic," the need for which a court may not "second guess," is equally flawed. Whatever deference may be due a legislative determination that an expenditure limitation is justified to guard against the possibility of a link between independent expenditures and corruption, the fact is that Congress did not intend § 9012(f) to serve such a function. In assessing the validity of restrictions on First Amendment rights, the actual purpose of the restrictions is central to the inquiry; the purpose intended by Congress is crucial, and no judicial "deference" is due a choice that Congress never made. Here, appellants seek to justify § 9012(f) on the basis of a purpose that Congress never considered.

Far from indicating that the statute was enacted to serve as a "prophylactic" against possible corruption arising from independent campaign expenditures, the legislative history of § 9012(f) indicates that "[t]he only reason" the measure was

included in the Fund Act was that "this was what was contained in [a] previous bill passed by the Senate" in 1967[23]; and the 1967 measure was not designed to limit independent expenditures but rather to effectuate the bill's narrower goal of restricting private expenditures by political committees (whether or not "authorized") to pay for a publicly financed candidate's campaign expenses—expenditures that would today be viewed as in-kind contributions.

That § 9012(f) itself was intended to reach independent expenditures is dubious at best (its qualified language suggests otherwise and its sponsor was equivocal); and, because the statute is aimed at protected expression, its reach should be narrowly, not broadly, construed.[24] But whatever § 9012(f)'s reach, there is no suggestion that it was meant to serve either as a "prophylactic" against corruption or as a safeguard against circumvention of the spending limitations applicable to "authorized" political committees. Construed to limit independent expenditures, § 9012(f) is a garden-variety expenditure limitation of the type struck down in *Buckley*—designed to control the quantity of private spending in election campaigns and the relative size of particular expenditures. A similar limitation on *group* expenditures, intended to serve these same goals, was in fact invalidated in *Buckley*.

It is disingenuous for appellants to defend § 9012(f) as a sensitive accommodation to First Amendment rights, designed to go no further than absolutely necessary to achieve the Fund Act's broader purposes. Section 9012(f)'s supporters themselves conceded—five years before *Buckley*—that the First Amendment problems it presented were unanswerable; and the only suggestion that § 9012(f)'s purpose was to avoid circumvention of the Fund Act's goals came from the measure's *opponents*, who considered § 9012(f)'s exemptions a fatal flaw

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[23] 117 Cong. Rec. 42,626 (1971) (remarks of Sen. Pastore, the Fund Act's sponsor).

[24] That § 9012(f) is content-neutral cannot save it from exacting judicial scrutiny, contrary to Common Cause's suggestion. (CC at 20-21.) There is no claim that § 9012(f) furthers any governmental interest "unrelated to the restriction of communication." *Buckley*, 424 U.S. at 18; *Bellotti*, 435 U.S. at 786. Every supposed evil identified with the expenditures restricted by § 9012(f) flows from the perceived value of the speech it makes possible.

in any effort to cap "overall" spending in publicly financed campaigns—a goal the Fund Act's sponsor specifically disclaimed. The legislative history of § 9012(f) leaves the measure's purpose in the Fund Act murky at best; but there is no suggestion that § 9012(f) was designed to minimize infringement of First Amendment rights or to effectuate the Fund Act's other aims, or as a "prophylactic" against corruption.

3. Appellants' attempt to link the fate of public financing to § 9012(f) is also doomed. Foreclosed by the First Amendment from defending § 9012(f) on its own terms as a campaign-expenditure limitation, appellants seek to recast the provision as an essential component of a larger statutory scheme that *can* be defended (and, indeed, one that this Court in *Buckley* upheld)—namely, the Fund Act's scheme for optional public financing of presidential election campaigns of which § 9012(f) is a part. But the reality is that § 9012(f) is not integral to the Fund Act's scheme of public campaign financing. From the standpoint of Congress's twin purposes in enacting that plan—freeing presidential candidates from the burdens of raising campaign funds from private sources, and enabling presidential candidates to campaign without becoming (or appearing to become) beholden to private contributors—§ 9012(f) is simply a *non sequitur:* limiting independent expenditures serves neither of these goals. In any event, "effectuation" arguments of the type advanced by the appellants have failed to impress this Court before. As the district court noted, § 9012(f) "must be judged on its own." J.S. App. 87a. So judged, § 9012(f) must fail.

ARGUMENT

I. INDEPENDENT EXPENDITURES DO NOT PRESENT A DANGER OF REAL OR APPARENT CORRUPTION SUFFICIENT TO JUSTIFY § 9012(f)

A. Appellants' Attempt To Erase the Distinction Between Expenditures and Contributions Rests On a Conception Of "Corruption" That Empties the Term Of All Meaning.

In *Buckley* v. *Valeo*, this Court held that preventing "the actuality and appearance of corruption" was a "constitutionally

sufficient justification" for limiting campaign contributions, 424 U.S. at 26, but that "the governmental interest in preventing corruption and [its] appearance" is "inadequate to justify" limitations on campaign expenditures. *Id.* at 46. The Court's conclusion that preventing actual or apparent corruption could justify limiting contributions but not expenditures was rooted in a concept of "corruption" that appellants now ask this Court to dismiss as "crabbed." (CC at 31.) But the concept of "corruption" that appellants invite the Court to adopt in its place empties the term of all meaning; and in propounding their alternative, appellants are not, in truth, seeking to curb "corruption" at all. By propounding a view of "corruption" that would render independent expenditures subject to the same restrictions as contributions, appellants' true aim is to permit Congress to limit the quantity of private money generally, and the relative size of particular expenditures, in presidential election campaigns—goals forbidden by *Buckley*.

When Congress enacted the Fund Act, its image of corruption, as the Court recognized in *Buckley*, was that of the "bought" politician—the politician who, dependent on private campaign funds, was required to go hat in hand begging contributions from supporters, selling future favors to them in exchange for their money. The paradigm of such "corruption" is the giving and taking of bribes. Although *Buckley* made clear that Congress need not limit itself to preventing only "the most blatant and specific attempts of those with money to influence governmental action," 424 U.S. at 28, it recognized that, to fall within the class of abuses that Congress sought to prevent, such "attempts to influence" must at least be *akin* to bribes, exacting or appearing to exact "improper commitments" from the candidate. *Id.* at 47. The Court nowhere suggested that *any* act of political support that a successful candidate might be expected to recognize and reward constitutes the "improper influence" that defines "corruption" under the Fund Act. *Id.* at 30.

What makes influence "improper" may be difficult to define with precision. But central to any definition must be an element of financial control exerted over the candidate by those

who attempt to influence him, and a candidate's susceptibility to such control. It was, among other things, to free presidential candidates from dependence on private campaign contributions—and hence from susceptibility to financial control by private parties—that Congress passed the Fund Act:

> "If the candidate chooses to accept public financing he or she is beholden unto no person and, if elected, should feel no post-election obligation toward any contributor of the type that might have existed as a result of a privately financed campaign." [28]

Freeing the candidate from these "coercive pressures and attendant risks of abuse," *Buckley*, 424 U.S. at 53, also strengthens public confidence in the integrity of the electoral system. As the district court noted, "[t]he public might well believe these [publicly financed] candidates to be less susceptible to the entreaties of special interest groups since they already have significant funding." J.S. App. at 67a.[29]

Thus, apart from circumstances of outright bribery, it is the candidate's dependence on private contributions, and his susceptibility to financial control by private parties, that give rise to the fact or possibility of the political debts that Congress considered corrupt. The mere fact that a candidate may be grateful for a supporter's independent advocacy of his cause does not demonstrate improper "political indebtedness," contrary to appellants' claims (CC at 28; FEC at 33); and the fact that a President "feels obligated" to those who supported his campaign is entirely consistent with "democratic government and the citizenry's confidence in it." (CC at 30.) It would indeed be a cruel shock to a candidate's supporters if, once elected, the candidate championed the causes of those who

[28] *Republican National Committee* v. *FEC*, 487 F. Supp. 280, 284 (S.D.N.Y.) (3-judge court), 616 F.2d 1 (2d Cir.) (en banc), *aff'd mem.*, 445 U.S. 955 (1980).

[29] Common Cause stands this logic on its head in asserting that the danger of corruption from independent expenditures "is particularly great in the case of a publicly financed candidate" *because* he "may not accept [private] contributions." (CC at 28.) It is precisely because publicly financed candidates do not *need* private contributions that the danger of corruption is not present.

opposed him. Nor, contrary to appellants' claims, is there anything improper about an elected official's decision to favor his supporters with appointments to public office. (See FEC at 25; CC at 13.) As the district court observed, such appointments are part of "the mainstream of [the] American political tradition." J.S. App. 71a. Far from eroding public confidence in the integrity of the electoral process, the fact that support is rewarded is indispensable to the process, assuring "citizen participation in political campaigns." *Buckley*, 424 U.S. at 36.

Appellants disagree, and urge this Court to recognize a concept of "corruption" that is altogether different. Appellants apparently envision a national polity in which selfless, public-spirited citizens quietly toil for the candidates they support in blank anonymity, expecting and receiving neither recognition nor reward for their labors; in which candidates for public office, once elected, show no special solicitude for the interests of those who elected them, but instead govern on a plane of Burkean abstraction. For citizens to act visibly and effectively, gaining the candidate's attention and earning his gratitude, is, for appellants, "corruption" every bit as venal as a bribe. Corruption is threatened, in their view, whenever "the candidate knows who is helping him and how much help he is getting." (CC at 29.)

This absurdly expansive view of "corruption" (and the fantasy vision of American politics on which it is based) cannot seriously be intended. For appellants, it is what *follows* from accepting this view that really counts—a result that *Buckley* forecloses them from pursuing in a more straightforward way. What appellants really seek, despite *Buckley*, is to permit Congress to control the quantity of private money in presidential election campaigns, and the relative size of particular expenditures. Thus, appellants stress the "massive" amounts of money that some political committees spend (FEC at 24; *id.* at 28); and they reiterate that the "recurring particular evil" with which Congress has sought to deal over the years is "the influence and power of big money." (CC at 5; *id.* at 25.) They stress that Congress sought to ordain a regime of "'one man, one vote, one dollar'" (*id.*),[37] and desired to diminish the

[37] Quoting 117 Cong. Rec. 42,408 (1971) (Sen. Pastore).

relative influence of those able to "amass and spend large amounts of money." (*Id.*)

Both these goals were rejected in *Buckley*. 424 U.S. at 48-49, 57. As the district court recognized, "the prevention of corruption and its appearance provides the *only* legitimate basis" for regulating campaign spending. J.S. App. 46a (emphasis added). *See Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 296-99 (1981). Appellants now seek to deploy the only remaining justification for campaign-spending limitations permissible under the First Amendment—the prevention of corruption and its appearance—as a vehicle for accomplishing, in the name of that legitimate purpose, goals forbidden by this Court for good reason in *Buckley*. The Court should decline their invitation to eviscerate *Buckley* and its progeny in this way.[28]

B. Appellants' Other Attempts To Equate Expenditures and Contributions Rest On Constitutionally Indefensible Premises.

Appellants ask the Court to erase the distinction between expenditures and contributions not only on the basis of their concept of "corruption" (and the vision of American political life it presupposes) but also on the basis of their view that expenditures should not be considered "independent" if they are consistent with and effectively promote a candidate's campaign. (*E.g.*, FEC at 24; CC at 10-11.) In such circumstances, appellants appear to argue, independent expenditures function like expenditures of the candidate's official campaign and thus may legitimately be treated like contributions; with the distinction between expenditures and contributions thereby erased, Congress may restrict one as readily as the other.

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[28] Ironically, the rationale for seeking to "break[e] the skyrocketing cost of political campaigns" was "to open the political system more widely" to those without access to large amounts of money. *Buckley*, 424 U.S. at 26—a goal that is directly served, without restricting First Amendment expression, by permitting individuals of modest means to aggregate their resources through political committees and thereby effectively to contend with wealthy individuals and the organized political parties. For this reason, permitting individuals to aggregate their resources through political committees also serves "to equalize the relative ability of all citizens to affect the outcome of elections." *Id.* Both of these goals, which the appellants purport to favor, are undermined by § 9012(f).

This view is flawed in two fundamental respects. First, it penalizes speech and association merely for being effective. For appellants, it is the great sin of the political committees that they get the job done. Throughout their briefs they castigate political committees for being "well-financed [and] professionally run" (CC at 8), staffed by "speechwriters, public relations and advertising specialists, and media experts." (*Id.* at 8, 10.) Worse still, political committees are "sophisticated" (CC at 10; FEC at 24), using "computers and . . . detailed information." (*Id.* at 26.) Worst of all, they are "directly and visibly helpful to presidential candidates" (CC at 12), "substantially advanc[ing] the candidate's chance of election." (FEC at 26.) Appellants urge that these characteristics justify treating concededly independent expenditures of political committees as though they were contributions to the candidate.[29]

There can be little doubt, as the district court observed, that political committee spending "probably does exactly what [the PACs] claim: help the man they support. That may be why so many give." J.S. App. 78a. Yet it is this very quality of political-committee spending that appellants decry. Thus, it bears repeating that "the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is

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[29] To the extent that expenditures are not independent, they are subject to restriction as campaign contributions. See page 3, note 3, above. Common Cause, however, urges the Court to eliminate the protections afforded independent expenditures on the ground that "[t]he FEC cannot effectively enforce the prohibition on coordinated activity between unauthorized political committees and the official campaigns they support." (CC at 16.) Common Cause argues that "[c]oordination is often very difficult to uncover and prove. Investigations take time, and can rarely be completed prior to the election in question." (*Id.*) The Democrats make a similar claim. (DEM at 30-31.) The basis for these claims, it appears, is the FEC's abandonment, after three years of investigation, of allegations of coordination between appellees (and other conservative political committees) and the official Reagan campaign in 1980, on the ground that no "concrete evidence" supporting the allegations had been discovered. (See page 6 & notes 11-12, above.) It would undoubtedly simplify things if the FEC did not have to "uncover" or to "prove" coordination in order to restrict a political committee's expenditures; but, as discussed below, it would also defeat the statutory scheme and trench on basic First Amendment rights.

unconvincing.' " *Bellotti*, 435 U.S. at 790, quoting *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S. 684, 689 (1959).[30]

[30] Appellants suggest that limiting independent expenditures by political committees is justifiable because those who contribute to such committees in some cases exercise little control over the immediate use of their money. (*E.g.*, FEC at 28-29; DEM at 14-17; CC at 35-36.) Their claim seems to be that a limitation on political-committee expenditures in such cases "entails only a marginal restriction upon the contributor's ability to engage in free communication," *Buckley*, 424 U.S. at 20-21, and that neither the committees nor those who operate them have any independent First Amendment right to use other people's money, freely given, to amplify their own voices. Both claims are wrong.

First, an individual's right to express himself in association with others has never been held to depend on his immersion in the day-to-day operation of the organization that he and other like-minded individuals have chosen as their common vehicle for self-expression. No such test was acknowledged when this Court in *Buckley* held that FECA's limitation on expenditures by "independent associations" is " 'simultaneously an interference with the freedom of [their] adherents.' " 424 U.S. at 22 (citation omitted). And when a plurality of the Court spoke of "speech by proxy" in assessing FECA's limitation on contributions by unincorporated associations to multi-candidate political committees, *California Medical Ass'n*, 453 U.S. at 196, it specifically disclaimed any reference to "expenditures made jointly by groups of individuals in order to express common political views," and it expressly declined to address the constitutionality of the contribution limitation "if construed to limit the amount individuals could jointly spend to express their political views." *Id.* at 197 n.17.

It would not be possible for citizens to combine their resources effectively in national elections—making possible programs of nationwide communication through the media and other expensive large-scale activity—without centralizing everyday decision-making responsibility in the hands of those who administer political committees. The attack on political committees on the ground that their contributors do not manage them is therefore simply a variation on the theme that political committees are evil because they are effective. As explained above, however, independent advocacy by political committees may not be restricted "merely because they are *efficient* groupings of like-minded individuals." *Common Cause* v. *Schmitt*, 512 F. Supp. at 497 (emphasis in original).

Second, appellants' reliance on Congress's latitude in restricting contributions is also misplaced. Section 9012(f) does not limit contributions to political committees; it limits expenditures by political committees. This distinction is constitutionally significant here. In upholding FECA's contribution limitations in *Buckley*, the Court observed that those limitations "permit associations and candidates to aggregate large sums of money to promote effective advocacy." 424 U.S. at 22. (In his concurring opinion in *California*

(footnote continues)

To permit Congress to limit campaign speech because it is "helpful" to a candidate (*i.e.*, effective) cannot be justified except on grounds that have already been rejected by this Court as hostile to First Amendment values. Thus, one might urge that particularly effective speech be muted so that the messages of others may be heard—but the Court in *Buckley* held that Congress may not play the role of leveller, "equalizing the relative ability of individuals and groups to influence elections." 424 U.S. at 48. See also *Bellotti*, 435 U.S. at 790-91. Or one might urge that particularly effective speech be restricted lest it prove too convincing—but the Court in a legion of other cases has held that the government may not restrict otherwise protected speech on the paternalistic premise that people are

(footnote continued)

Medical Ass'n, Justice Blackmun stressed his view that contributions to "a [political] committee that makes only independent expenditures" cannot be limited because such expenditures pose no "perceived threat of actual or potential corruption." 453 U.S. at 203.) Moreover, even assuming that independent advocacy by some political committees involves "speech by someone other than the contributor," 424 U.S. at 21—namely, speech by the political committees or by those who operate them day to day—§ 9012(f) is a direct restriction on *their* speech, and no compelling governmental interest justifies that restriction. Private citizens have a First Amendment right to use other people's money, freely given, to amplify their own voices; that is an exercise of their own rights of association and expression.

Appellants appear to concede the vagueness of any construction of § 9012(f) that conditions a group's freedom to spend more than $1,000 to further the election of a publicly financed presidential candidate on the degree to which those who operate the group day to day are accountable to those who supply the group's funds. (FEC at 34; CC at 48.) Appellants assert, however, that answers to any questions arising from this "control" test may be sought by requesting advisory opinions from the FEC. But it is the very essence of forbidden censorship to vest in government officials discretion to decide according to vague criteria who may speak and who may not, and to require would-be speakers to seek advance assurance from government officials that they may engage in protected expression without fear of reprisal. In any event, there is no evidence that Congress itself intended such a test, see J.S. App. 88a, and the FEC has amply demonstrated that it will treat any group that spends more than $1,000 to influence the outcome of an election as a "political committee." See *id.* at 92a and page 11, note 21, above.

incapable of making their own judgments.[31] Ultimately, then, appellants' claim that expression may be restricted because it is effective can be founded only on premises that cannot be defended.[32]

Appellants' view is also constitutionally defective because it obliterates the distinction between the First Amendment rights of the candidate and those of his supporters. It is only because a presidential candidate has accepted public funding that the expenditures of political committees of his supporters become subject to § 9012(f)'s $1,000 expenditure limitation. But a candidate cannot effectively renounce the First Amendment rights of others; his acceptance of public financing does not diminish the First Amendment rights of those who wish to speak independently on his behalf. See *ACLU* v. *Jennings*, 366 F. Supp. 1041, 1053 (D.D.C. 1973) (3-judge court), *vacated as moot*, 422 U.S. 1030 (1975). Indeed, a three-judge district court has held that the Fund Act's public-financing provisions do not abridge the rights of a publicly funded candidate's supporters precisely because "uncoordinated expenditures are permitted without limit," *Republican National Committee* v. *FEC*, 487 F. Supp. 280, 286 (S.D.N.Y. 1980), and this Court summarily affirmed. 445 U.S. 955 (1980). As the district court observed in *Common Cause* v. *Schmitt:*

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[31] See, *e.g.*, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 769-70 (1976); *Central Hudson Gas & Electric Co.* v. *PSC*, 447 U.S. 557, 561-62 (1980). As the Court has observed:

> "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by [particular speakers], it is a danger contemplated by the Framers of the First Amendment."

Bellotti, 435 U.S. at 791 (footnotes omitted), citing *Wood* v. *Georgia*, 370 U.S. 375 (1962).

[32] "That the language and format employed in the . . . communications [of political committees] may have a professional touch does not make it any less the language of the individual contributors; one of the things he or she most wants is the professional touch to make his or her speech efficient and effective in the modern age." *Common Cause* v. *Schmitt*, 512 F. Supp. at 497.

> "Supporters of candidates have rights separate from the candidates they favor, rights which cannot be alienated by the candidate's choice with regard to public funding. There is no constitutional reason that the organization of individual supporters of a candidate into groups called 'political committees' should impugn the distinct and separate rights of campaign outsiders to sponsor political speech. Independent expenditures are the principal—and protected—source of this sponsorship." 512 F. Supp. at 496. "Whereas a presidential candidate by accepting public funds may choose for him or herself to do without unlimited contributions and expenditures, the candidate's public supporters have a separate, protected right to express themselves, individually or jointly. This preserves free access and full participation in the public debate." *Id.* at 501.

What appellants actually propound is a bizarrely misconceived doctrine of "conscious parallelism" (CC at 28; FEC at 33) in which the fact that a political committee that is independent of a candidate's official campaign takes its cue from the observed strategy of the campaign in an effort to promote his election subjects it to the same limitations that apply to him and his agents. Any political committee that effectively promotes a publicly financed candidate's cause becomes, under this view, a "shadow campaign" (CC at 28, 41) that Congress may regulate as though the political committee were an agency of the candidate himself. Both because this doctrine would penalize effective speech and association as such, and because it would permit the candidate who accepts public financing to alienate the First Amendment rights of his supporters, this doctrine must be rejected.

C. Appellants Adduced No Evidence Linking Expenditures To Corruption In the Accepted Sense Of the Term.

Common Cause is correct in observing that appellants "[d]id not have to prove that a bribe was offered or accepted in

the 1980 campaign" for § 9012(f) to be sustained. (CC at 31.) But that does not mean that § 9012(f) may be upheld without any showing of a link between independent expenditures by political committees and corruption or its appearance. As we have shown, appellants' effort to conjure such a link by redefining "corruption" must be rejected; their attempt to establish a link between independent expenditures by political committees and corruption in the accepted sense of the term must fail as well.[30]

Appellants offered three types of "evidence" to link independent expenditures by political committees to corruption or its appearance. First, they offered various opinion-poll results which they claimed showed that independent expenditures by political committees in support of publicly financed presidential candidates are eroding public confidence in the integrity of the electoral process. The district court carefully explained why those poll results showed no such thing. J.S. App. 61a-68a. Appellants also submitted evidence that various individuals who spearheaded key political committees in the 1980 presidential election were given important positions in the Reagan administration. The district court explained why the appointment of such supporters was "in the mainstream of [the] American political tradition," *id.* at 71a, and found "nothing even remotely resembling corruption involved." *Id.* at 72a. Finally, appellants claimed that various individuals who had given substantial sums to NCPAC received a handshake and a few private words with Reagan administration officials. The district court correctly held that an "opportunity to 'grip and grin' does not constitute corruption or [its] appearance." *Id.* at 73a.

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[30] It was because the danger of corruption or its appearance (in the accepted sense of the term) is "inherent" in a system permitting large private contributions, *Buckley*, 424 U.S. at 28, that the Court found no reason to require more than a few "examples surfacing after the 1972 election" to assure itself that the link between contributions and corruption "is not an illusory one." *Id.* at 25. Because the danger of corruption or its appearance is not "inherent" in spending money on independent advocacy, evidence that the link appellants assert between expenditures and corruption is not "illusory" is essential.

Beyond evaluating this "evidence," the district court considered whether the conduct of appellees "would cause a reasonable person to think that people or groups were being rewarded because of their expenditures on behalf of a presidential candidate." *Id.* at 77a. It concluded that there was no more possibility of an "air of impropriety" here than might exist whenever an elected official takes action consistent with the desires of supporters who have made expenditures on his behalf during the election campaign. *Id.* at 78a. And the court found that such expenditures "benefit" the candidate on whose behalf they are made only in the general sense that they help get him elected. *Id.* The district court did not find, and could not have found, that independent expenditures exact "improper commitments" or create corrupt "political debts."

The district court's conclusion that no link had been shown between independent expenditures by political committees and corruption or its appearance was fully consistent with this Court's decision in *Buckley* eight years ago and the conclusions of the three-judge district court in *Common Cause* v. *Schmitt* in 1980. And, with respect to the conduct of appellees themselves, the district court pertinently observed that, after a three-year investigation, the FEC had been unable to find any evidence of illicit coordination or cooperation between NCPAC and FCM, on the one hand, and the Reagan campaign, on the other, in the 1980 election. Appellants were not required to prove bribery, but they had an obligation at least to demonstrate that their speculations have substance. On this record, and within the framework established by *Buckley*, § 9012(f) cannot be justified by any supposed link between independent political-committee expenditures and corruption or its appearance.

II. THERE IS NO EVIDENCE THAT CONGRESS INTENDED § 9012(f) AS A "PROPHYLACTIC" MEASURE TO GUARD AGAINST POSSIBLE CORRUPTION.

Unable to establish any direct link between independent expenditures by political committees and corruption or its

appearance, appellants resort to characterizing § 9012(f) as a "prophylactic" measure, the need for which a court supposedly may not "second-guess." (FEC at 9-10; CC at 24.) The maxim that a court should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared" is drawn, of course, from *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 210 (1982) ("*NRWC*"). But this maxim is misplaced in the instant case, for, as the district court recognized, this Court did not mean by that language to proscribe exacting scrutiny of statutes that restrict basic First Amendment rights. J.S. App. 58a-60a. More fundamentally, the maxim can apply only where Congress intended the restriction as a "prophylactic" measure—that is, as a measure justified, in the absence of a direct or demonstrable link between corruption and the conduct proscribed, by the possibility of such a link. Here, there is no indication that Congress intended anything of the kind. There can be no judicial "deference" to a choice that Congress never made.

A. *NRWC* Does Not "Control This Case."

Because appellants rely so heavily on *NRWC* and its supposed rule of judicial deference to "prophylactic" laws restricting First Amendment rights (the Democrats claim that it "controls this case" (DEM at 24)), it is useful to examine just what the Court held in *NRWC* and what its rule of deference means.

1. *NRWC* Simply Reaffirmed the Power Of Congress To Prevent Corporations From Abusing the "Special Advantages Which Go With the Corporate Form."

The restriction at issue in *NRWC* forbade corporations from soliciting, other than from certain persons, contributions to separate segregated funds to be utilized for political purposes. *See* 2 U.S.C. § 441b(b)(4)(C).[34] The persons from whom the law permitted contributions to separate segregated funds to be

[34] As the Court noted, FECA prohibits corporations from making contributions or expenditures in connection with federal elections, 2 U.S.C. § 441b(a), but permits them some participation in the federal electoral process by allowing them to establish and pay the administrative expenses of "separate segregated funds," which may be "utilized for political purposes." *Id.* § 441b(b)(2)(C). *See* 459 U.S. at 201.

solicited included, in the case of a corporation without capital stock, the "members" of the corporation; a corporation with capital stock was permitted to solicit contributions from shareholders. The National Right to Work Committee ("NRWC"), a nonprofit corporation without capital stock, claimed that the members of the general public from whom it solicited contributions for its separate segregated fund must be deemed its "members" under § 441b(b)(4)(C) or else the provision's restriction on its solicitation of contributions would violate the First Amendment.

This Court held that those from whom NRWC had solicited contributions were not its "members" under the statute, and that, even so, § 441b(b)(4)(C) is constitutional.[35] The Court held that § 441b(b)'s solicitation restrictions are permissible as part of § 441b's broader scheme of (1) preventing corporations from taking advantage of "the special advantages which go with the corporate form of organization" to amass aggregations of wealth that could be used corruptly *i.e.*, to incur political debts from legislators through contributions; and (2) protecting corporate stockholders against being betrayed by having the money they have provided the corporation for corporate purposes used for some other purpose instead. These two purposes, the Court held, were constitutionally "sufficient" to justify § 441b(b)'s solicitation restrictions. 459 U.S. at 208.

The Court nowhere suggested that § 441b's anti-corruption purpose is served by *any* campaign-spending regulation that applies to corporations; to the contrary, the Court stressed that this purpose is served by a regulation that aims to prevent "the creation of political debts" that may result from "large financial *contributions*." *Id.* at 208 (emphasis added). Section 9012(f) is not aimed at contributions at all, whether or not by corpo-

[35] As noted earlier, NRWC made no claim that it was a "political committee" and thus exempt from treatment as a corporation for purposes of FECA's corporate-solicitation restrictions. *See page 8, note 17, above.*

rations.[30] The stockholder-betrayal purpose—which justifies the requirement of separate segregated funds—itself did not support the solicitation restriction at issue in *NRWC*, which governed solicitation by corporations *without* capital stock; and that purpose would not justify special restrictions on expenditures by political committees such as appellees, who have no stockholders. The membership-solicitation restriction upheld in *NRWC* was merely ancillary to § 441b's more basic limitation on the circumstances in which corporations with capital stock may solicit from their stockholders.

The danger of stockholder-betrayal is non-existent, and the possibility of amassing staggering war-chests by exploiting the corporate form removed, when a corporation without capital stock solicits contributions to a separate segregated fund from its members. Congress accordingly permitted such solicitation, and the Court supported Congress's decision to forbid solicitation by corporations without capital stock in other circumstances. Had NRWC been a political committee—or if, as a corporation, it had assured that those members of the general public from whom it solicited contributions were sufficiently "attached to [its] corporate structure . . . to qualify as 'members' under the statutory proviso," 459 U.S. at 206—it could have solicited more freely.

Section 9012(f) is not aimed at corporations. It applies to any group of people, "whether or not incorporated." 26 U.S.C. § 9002(9). See page 3, note 2, above. The "special characteristics" of the corporate structure that may justify special fund-raising and spending limitations on corporations as such in election campaigns do not justify special limitations on political committees as such—even though some political committees

[30] It is true, as appellants point out, that § 441b(a) restricts corporate expenditures as well as corporate campaign contributions. *NRWC* did not, however, uphold § 441b(b)'s solicitation restrictions on the basis of a purpose justifying restrictions on corporate expenditures—although the stockholder-betrayal rationale would apply to such restrictions as well. The restriction at issue in *NRWC* was a restriction on corporate solicitation, not on contributions *or* expenditures. It was, however, the fact that the solicitation restrictions served to minimize problems posed by corporate contributions that led the Court, in part, to uphold the restrictions.

may be organized as corporations. See 11 C.F.R. § 114.12(a) (1984) (political committees organized as corporations not subject to FECA's corporate contribution or expenditure limitations). Cf. *Belloti*, 435 U.S. at 805 (White, J., dissenting). The principles on which the Court upheld § 441b(b) therefore do not apply to § 9012(f).

2. The Decision of Congress That the Court Declined To "Second Guess" In *NRWC* Was Simply the Decision To Make § 441b(b)'s Restrictions Applicable To All Corporations.

This Court in *NRWC* stated that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." 459 U.S. at 210. In making this statement, however, the Court was not declining to "second-guess" Congress's determination that the danger of corporate abuse warranted special restrictions; the Court had already given that determination searching consideration, and had concluded that Congress's determination of danger was justified. *Id.* at 207-09. The Court's admonition of deference was, instead, a response to the observation that the solicitation restriction at issue in *NRWC* applied not only to corporations whose "great financial resources" afforded them obvious opportunities to bring improper pressure to bear on politicians, but also to less "fortunately situated" corporations, who could present no real danger of such improper influence. *Id.* at 210.

In short, the legislative determination that the Court declined to "second-guess" was simply a determination to make § 441b's restrictions applicable to all corporations; the Court did not uncritically accept Congress's conclusion that the corruption at which the restrictions were aimed—corruption from corporate contributions—is a genuine danger. Having determined that the means chosen by Congress to meet that danger were otherwise "sufficiently tailored . . . to avoid undue restrictions on . . . associational interests," 459 U.S. at 208, the Court simply declined to engage in "excessive fine-tuning" of those means. J.S. App. 60a n. 36. It declined to require Congress to limit its solicitation restrictions only to those corporations that, on some hypothesized scale, were mighty

enough to threaten the evil feared. It was in concluding that Congress, to deal with a problem whose reality was not in dispute, might apply its solicitation restrictions to corporations as a class that the Court upheld Congress's power to fashion "prophylactic" measures aimed at preventing corruption, not to be "second-guessed" by courts.

That is altogether different from declining to decide whether a genuine need exists for measures that restrict basic rights. The Court has never permitted the government's mere assertion of a compelling interest, or its mere assertion that a restriction on basic rights serves a compelling interest, to immunize the restriction from exacting judicial review. This Court, as the district court recognized, has never embraced any such radical abdication of the judicial function where fundamental freedoms are at stake. J.S. App. 58a-60a. To the contrary, the Court's decisions establish the general principle that "[b]road prophylactic rules in the area of free expression are suspect." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963); *Tinker* v. *Des Moines Indep't Community School District*, 393 U.S. 503, 508-09 (1969).

NRWC did not diminish that principle. If a sufficient link between independent expenditures by political committees as a class and corruption or its appearance could be shown, the fact that the independent expenditures of *some* political committees cannot or do not threaten corruption would not automatically require invalidation of § 9012(f); under *NRWC*, a court would be reluctant to "second-guess" Congress's determination to make § 9012(f) applicable to *all* political committees. But nothing in *NRWC* required the district court in this case to rubber-stamp any supposed judgment of Congress that such a link exists. And, as demonstrated below, Congress in fact made no such judgment.

B. Section 9012(f) Was Not Intended To Protect Against Corruption.

The debate over what deference is due a decision by Congress to enact a campaign-spending restriction that serves as a "prophylactic" measure to prevent possible corruption is a red herring in this case, for Congress had no such purpose in

mind in enacting § 9012(f). A statute burdening protected activity cannot be constitutionally justified on a ground that cannot be demonstrated to have been a purpose Congress sought to achieve. *See Califano* v. *Westcott*, 443 U.S. 76, 86-88 (1979); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975).[37]

1. Construed To Limit Independent Expenditures, § 9012(f) Is Indistinguishable From the Other Expenditure Limitations That This Court Has Held Unconstitutional.

Appellants strain to show that Congress enacted § 9012(f) because it viewed campaign expenditures by political committees with special misgivings. Both the FEC and Common Cause attempt to portray § 9012(f) as the capstone of a five-year effort by Congress to reform the election-campaign laws. The FEC even goes so far as to suggest that earlier reform proposals were rejected as inadequate *because* they did not restrict political-committee expenditures. This portrait of § 9012(f) is misdrawn.

It is possible to discuss § 9012(f)'s expenditure limitation as *sui generis* only because this Court in *Buckley* invalidated the other campaign-expenditure limitations that Congress established in FECA—limiting individuals and groups to expenditures of $1,000 per year "relative to a clearly identified

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[37] It is certain that Congress had no evidence in 1971 sufficient to establish a nexus between independent expenditures and corruption, for this Court held in *Buckley* that no such evidence existed as late as 1976. *See* 424 U.S. at 46. When fundamental rights are at stake, a statute can be upheld only on the basis of the facts before Congress at the time of enactment. *See Rostker* v. *Goldberg*, 453 U.S. 57, 74-75 (1981) (in assessing constitutionality of 1948 selective service statute's exemption of women from draft registration, Court would examine evidence adduced in 1980 bearing on validity of exemption only because at that time Congress thoroughly reconsidered the exemption and specifically declined to repeal it).

Even if avoiding corruption might have been one of Congress's purposes, the statute might nonetheless be tainted if it was also motivated by aims since declared to be illegitimate. *See Board of Education* v. *Pico*, 457 U.S. 853, 870-75 (1982) (plurality opinion); *Larson* v. *Valente*, 456 U.S. 228, 254-55 (1982).

candidate," 18 U.S.C. § 608(e)(1); limiting expenditures by a candidate from personal or family resources to amounts ranging from $25,000 to $50,000 in connection with his campaign, depending on the office sought, *id.* § 608(a)(1); and limiting overall campaign expenditures by candidates for election to federal office, with the particular ceiling depending on the office sought. *Id.* § 608(c)(1). *Buckley*, 424 U.S. at 39-59.

Had independent political committees been a significant political force in 1976—and it is likely that they were not, in part, because of the limitations on all group expenditures imposed by § 608(e)(1)—the plaintiffs in *Buckley* would undoubtedly have challenged § 9012(f) as well as the other expenditure limitations. If § 9012(f) had been construed to limit independent expenditures; and, if § 9012(f) had been so construed, this Court would undoubtedly have invalidated it too, as simply an earlier, more limited version of § 608(e)(1), applying to joint spending by individuals on behalf of publicly financed candidates in presidential election campaigns. Nothing in the fact of § 9012(f)'s more limited reach serves to cure the First Amendment infirmities that required invalidation of § 608(e)(1).

2. Section 9012(f) Was Not the Capstone of Five Years of Election-Campaign Reform Efforts in Congress.

In portraying § 9012(f) as the centerpiece of election-campaign reform efforts, the FEC suggests that pre-Fund Act proposals were rejected because they failed to limit political-committee expenditures. (FEC at 4-5, 17-23.) This suggestion is unfounded. First, as the FEC itself acknowledges (*id.* at 20), the unsuccessful Honest Elections Act of 1967 included precisely such a limitation.[38] It was this limitation—§ 310(f) of the

[38] H.R. 4890, 90th Cong., 1st Sess., p. 24 (1967), *reprinted in* S. Rep. No. 714, 90th Cong., 1st Sess. 44 (1967). The FEC cites the provision, which it quotes at page 20 of its brief, as § 201, but that was the designation of the sub-title of the Honest Elections Act of 1967 (in the calendar print of the bill)

(footnote continues)

1967 bill—that Senator Pastore said he had mechanically made part of the Fund Act in 1971.[39] The legislative history indicates that § 310(f) was aimed not at independent expenditures, but at expenditures by non-"authorized" political committees to pay a candidate's campaign expenses—that is, at expenditures that subsequent legislation would require to be treated as "in-kind" contributions.[40]

Second, the legislative history of the unsuccessful pre-1971 campaign-spending reform proposals shows that each was doomed not by any single perceived shortcoming but by myriad perceived weaknesses. Thus, Senator Gore himself criticized the original Long Plan [41] not only because it did not attempt to limit private contributions or expenditures (see FEC at 17) but also because, in his view, it did not require timely enough disclosure or enough protection against fraud or misappropriation [42] and did not treat minor parties fairly,[43] and because, in his view, the "precedent-shattering" tax check-off used to finance the plan was "unwise" and possibly unconstitutional.[44] Other objections to Senator Long's 1966 legisla-

(footnote continued)

that included the limitation, § 310(f). Section 310(f) corresponds to § 9012(f) of the Fund Act. Although § 310(f) was to be a section of the Presidential Election Campaign Fund Act of 1966, as amended by the Honest Elections Act of 1967, we refer to § 310(f) as a section of the 1967 bill for convenience.

[39] 117 Cong. Rec. 42,626 (1971). As introduced, see *id.* at 41,758-61, the Fund Act was essentially identical to the subtitle of the Honest Elections Act of 1967 that provided for public financing of presidential election campaigns. The 1967 bill, which the Senate Finance Committee reported, died on the Senate calendar.

[40] See pages 38-42, below.

[41] Pub. L. No. 809, Title III ("Presidential Election Campaign Fund Act of 1966"), 80 Stat. 1587 (1966). Operation of the 1966 Act was suspended indefinitely in 1967 pending development of "guidelines" for distribution of the public funds. Pub. L. No. 26, § 5, 81 Stat. 57 (1967). Section 201 of the Honest Elections Act of 1967 was meant to replace the 1966 legislation.

[42] 112 Cong. Rec. 28,083 (1966).

[43] 113 Cong. Rec. 8,060-61 (1967).

[44] 112 Cong. Rec. 28,083 (1966); 113 Cong. Rec. 8,059-60 (1967).

tion were also voiced,[45] and his first proposed Honest Elections Act the following year encountered equally diverse criticisms as well.[46]

Thus, the FEC's attempt to portray § 9012(f) as the destination of a long march to election-campaign reform is seriously misleading.

3. Section 9012(f) Was Not Intended To Limit Independent Expenditures, Much Less Designed as a Prophylactic Measure To Prevent Corruption.

By its terms, § 9012(f) restricts expenditures by political committees to further the election of publicly financed presidential candidates where such expenditures "would constitute qualified campaign expenses if incurred by an authorized committee of such candidates."[47] Although the language of the statute does not explicitly distinguish between independent and non-independent expenditures, it is difficult to understand

[45] See, *e.g.*, 113 Cong. Rec. 8,305 (1967) (Sen. Clark) (plan should not be limited to presidential election campaigns); *id.* at 9,394 (Sen. Dirksen) (plan too costly); *id.* at 9,396 (Sen. Spong) (plan left too much power with party chairmen); *id.* at 8,297 (Sen. Williams) (plan should permit taxpayer to designate which party's candidate should receive his tax dollar).

[46] For criticisms of Senator Long's first proposed Honest Elections Act (its tangled history is described in the FEC's brief at page 19, note 11), see, *e.g.*, 113 Cong. Rec. 10,200-01 (1967) (Sen. Gore) (criticizing new plan for adhering to taxpayer check-off system and for imposing no overall ceiling on presidential election campaign spending, no individual or group contribution or expenditure limits, no protections against fraud or misappropriation, no clear administrative guidelines, and no safeguards against "the danger of centralized control of political party structure[s]"). It was Senator Long's second proposed Honest Elections Act of 1967 that included § 310(f). The bill, which was reported by the Senate Finance Committee, was not debated on the Senate floor.

[47] The Fund Act, as enacted, defined a "qualified campaign expense" as an otherwise-lawful expenditure by the candidate or his authorized committees to pay his campaign expenses during the designated expenditure report period. Pub. L. No. 178, Title VIII, § 801, 85 Stat. 564 (1971) (codified as 26 U.S.C. § 9002(11)). These are the expenses for which a

(footnote continues)

why, if § 9012(f) is meant to limit *all* expenditures by non-authorized political committees on behalf of a publicly financed candidate, its limitation applies only to expenditures which "would constitute qualified campaign expenses" if incurred by an authorized political committee. "Qualified campaign expenses" are the expenses of the candidate's campaign, whoever may incur them. Such expenses by definition cannot be independent. If incurred by someone other than the candidate or his agents, such expenses—the expenses of the candidate's campaign—constitute in-kind contributions, not independent expenditures.[48]

On its face, therefore, § 9012(f) only prohibits non-authorized political committees from paying a publicly financed candidate's campaign expenses. Such a prohibition implements the Fund Act's goal of assuring that only public funds be used to pay the campaign expenses of a presidential candidate who has chosen public financing. The candidate and his authorized political committees are made subject to the prohibition under provisions of the Fund Act requiring the candidate's certification that neither he nor his authorized political committees will accept private contributions to defray campaign expenses. 26 U.S.C. § 9003(b) & (c). See also *id.* § 9004(d) (prohibiting expenditures from personal funds of candidate or his family). Section 9012(f) applies this prohibition to non-authorized political committees.

Had Congress intended § 9012(f) to cover all political committee expenditures on behalf of publicly funded presiden-

(footnote continued)

publicly financed candidate may be reimbursed by the Presidential Election Campaign Fund, 26 U.S.C. § 9004(c)(1), and neither he nor his authorized political committees may use private funds to pay such campaign expenses except to the extent that the moneys available from the Fund are insufficient. See *id.* § 9003(b) & (c). The expenditure report period is the period beginning September 1 of the election year or the date that the candidate is nominated, whichever is earlier. *Id.* § 9002(12).

[48] See 11 C.F.R. § 100.7(a)(1)(iii)(A) (implementing FECA's definition of "contributions," 2 U.S.C. § 431(8)).

tial candidates, it could easily have done so.[49] That Congress did not do so, but instead expressly qualified the reach of § 9012(f)'s expenditure limitation, is persuasive evidence of its limited purpose. See 2A A. Sutherland, *Statutes and Statutory Construction* § 46.06 (4th ed. 1973). As noted earlier, the FEC has not consistently construed § 9012(f) to apply to independent expenditures. See pages 4-5 and note 8, above.

Apart from § 9012(f)'s qualifying language, the background of § 9012(f) is powerful evidence that it was not intended to cover independent expenditures. Apart from the sparse history of § 9012(f) itself, the legislative history indicates that the language from which § 9012(f) was derived—to wit, § 310(f) of the Honest Elections Act of 1967—was meant to refer to expenditures by party-connected political committees to pay the expenses of the candidate's campaign (expenditures that today would be treated as in-kind contributions), and not to expenditures that would be treated as independent. Because there was little discussion of § 9012(f)'s meaning or purpose in 1971, and because § 9012(f) was based directly on § 310(f), the legislative history of § 310(f) is relevant.[50]

a. The Purpose Of § 310(f) Of the Honest Elections Act Of 1967

In explaining the purpose of § 310(f), the Senate Finance Committee stated that the provision's limitation would prevent a political committee that was not an "authorized" political committee from spending more than $1,000 "for a candidate's qualified campaign expenses." S. Rep. No. 714, 90th Cong., 1st

[49] *Compare* former 18 U.S.C. § 608(e)(1) (limitation applicable to "any" expenditure beyond $1,000 ceiling during the calendar year, without qualification).

[50] See *United States* v. *Plesha*, 352 U.S. 202, 205 (1957); *Boone* v. *Lightner*, 319 U.S. 561, 565 (1943). The Fund Act's sponsors urged its passage on the strength of the "careful consideration" given the measure by the Senate in 1967. 117 Cong. Rec. 41,939 (1971) (remarks of Sen. Kennedy) (citing basis for Fund Act in 1967 hearings and committee report).

Sess. 18, 28 (1967).[51] This explanation indicates that what Congress had in mind were not expenditures to further a candidate's election through independent advocacy, but expenditures to cover the candidate's campaign expenses—expenditures that would be treated as in-kind contributions today. See 11 C.F.R. § 100.7(a)(1)(iii) (1984).

This interpretation is consistent with a concern repeatedly voiced during the hearings that yielded the 1967 bill—that party-connected committees that were not formally "authorized" might pay the candidate's campaign expenses, thereby undermining the contribution and expenditure limitations applicable to the publicly financed candidate and his authorized political committees. It was the intention of those urging a limit on political committee expenditures that the limit apply to expenditures by political committees that were connected with or controlled by a candidate's official campaign (whether or not such committees were formally "authorized").[52]

The supporters of a limit on political-committee expenditures repeatedly disclaimed any intention to limit "the expenditures made by . . . committees which are truly inde-

[51] The $1,000 restriction also applied to contributions by such committees to a publicly financed candidate. See *id.* at 44 (reprinting 310(f)(1)). The distinction between paying a candidate's campaign expenses directly (*i.e.*, making in-kind contributions) and giving him or his agents money to do so would account for § 310(f)(1)'s separate restrictions on expenditures and contributions. Except for certain technical differences, the definition of "qualified campaign expenses" under the Honest Elections Act of 1967 was identical to that under the Fund Act as enacted. See S. Rep. No. 714, *supra*, at 38.

[52] *Political Campaign Financing Proposals: Hearings before the Senate Finance Comm.*, 90th Cong., 1st Sess. 172 (1967) (Under-Secretary of Treasury Joseph W. Barr) (political committees "controlled by the national party" were the targets of contemplated expenditure limitation); *id.* at 84 (same); *id.* at 92 (groups organized by "somebody . . . from the national committee"); *id.* at 163 (Comptroller General Elmer B. Staats) (limitation aimed at groups "working part and parcel under the national campaign"); *id.* at 166 (test is "party connection"). Independent political committees such as NCPAC and FCM (and *amicus* NCC)—organized to promote the election of candidates of a distinct political outlook but having an existence independent of such candidates and particular election campaigns—were essentially non-existent at the time. (See CC at 7.)

pendent." [53] They acknowledged that any such limit would, at a minimum, "present[ ] a very real constitutional issue." [54] And although concern was expressed at the difficulty of disproving some claims of independence,[55] such difficulty was regarded as an inevitable consequence of an approach designed to minimize restrictions on First Amendment expression.[56]

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[53] 1967 Hearings, *supra*, at 172 (Staats); *id.* at 97 (Barr) (proposed legislation not aimed at organization unconnected to national committee or candidate); *id.* at 136 (Sen. Long) ("No matter how pure we try to make a candidate's election, . . . there is still no way that we could keep his friends from proceeding to organize and raise large amounts of money and spend it in ways that they thought would help advance his candidacy."); *id.* at 139 (same); *id.* at 161 (same); *id.* at 152-53 (Staats) ("expenditures of independent committees and of individuals on behalf of a candidate would not be affected by the 1966 act or by the proposed amendment"); *id.* at 163 (same); *id.* at 164 (same). Herbert Alexander prophetically suggested that the legislation under consideration would stimulate "the emergence of independent groups." *Id.* at 344.

[54] 1967 Hearings, *supra*, at 174 (Staats); *id.* at 75, 76, 81, 83, 84, 92, 93, 97, 136 (Barr); *id.* at 92, 93, 136 (Sen. Long); *id.* at 81 (Sen. McCarthy); *id.* at 397-99 (colloquy between Sen. Williams and Assistant Attorney General Fred M. Vinson, Jr.). Senator Gore acknowledged that, although the question did not arise with respect to limitations on expenditures by a candidate who has accepted public funds, "we have the constitutional question of freedom of speech with respect to prohibiting private political expenditures or contributions" by others. *Id.* at 109.

[55] *E.g.*, 1967 Hearings, *supra*, at 137 (Barr); *id.* at 155 (Staats); *id.* at 163-66 (colloquy between Comptroller General Staats and Senator Anderson).

[56] *Id.* at 139 (Barr). The Honest Elections Act of 1967, containing § 310(f), emerged from these hearings. See 113 Cong. Rec. 30,768 (1967) (remarks of Sen. Long). To the extent that the hearing witnesses discussed specific legislation, most discussion focused on an administration bill, S.1883, 90th Cong., 1st Sess. (1967), that would have provided public financing for a more limited range of campaign expenses. 1967 hearings, *supra*, at 55 (S. 1883's proposed § 303(c)(7)(H) (defining "qualified campaign expenses")), but set no limitation on expenditures by non-authorized political committees to pay such expenses. The language of § 310(f) appears to be derived from a bill introduced by Senator Gore, S. 1827, 90th Cong., 1st Sess. (1967). 1967 Hearings, *supra*, at 36 (S.1827's proposed § 112(h)). S.1827 would also have provided public campaign financing, but its expenditure limitation was not restricted to political-committee expenditures that would have constituted "qualified campaign expenses" if incurred by an authorized political committee. Instead, Senator Gore's political-committee expenditure

(footnote continues)

It was because the central purpose of the 1967 bill—like that of the Fund Act—was to eliminate a candidate's dependence on private contributions and his susceptibility to improper influence that Senator Long, Chairman of the Senate Finance Committee, commented that complaints about leaving independent expenditures unrestricted "missed the point completely." [57] As Chairman Long explained, "independent activities" do not exert improper influence.[58]

Thus, it appears that § 310(f) was drafted to assure that the efficacy of the bill's restriction on the use of private money to pay "for a candidate's qualified campaign expenses" in publicly financed presidential election campaigns, S. Rep. No. 714, *supra*, at 28, would not depend on whether the political committees that paid for such expenses were formally "authorized." As noted above, if a non-authorized political committee pays a candidate's qualified campaign expenses, such expenditures would today be defined as in-kind contributions under FECA, subject to the spending limitations applicable under the Fund Act to authorized political committees of publicly-financed presidential candidates. If the political committee's expenditures are not to pay such expenses, and are not otherwise coordinated, the expenditures would today be defined as independent under FECA and not of the type that Congress may limit. In short, the distinction between independent expenditures and in-kind contributions, embodied in FECA in 1976, solves the problem to which § 310(f) was addressed.

(footnote continued)

limitation was unqualified. The Honest Elections Act of 1967 was a compromise between Senator Gore, who abandoned his call for an unqualified political-committee expenditure limitation, and Senator Long, who yielded to Senator Gore's insistence that only public funds be used to pay for a publicly financed candidate's campaign expenses. See 113 Cong. Rec. 30,769 (1967) (Sen. Long); *id.* at 30,770 (Sen. Gore). The result was § 310(f)'s limitation on non-authorized political-committee expenditures "for a candidate's qualified campaign expenses." S. Rep. No. 714, *supra*, at 18, 28. Limitations on the use of private funds to pay campaign expenses in publicly financed campaigns had not been in the Presidential Election Campaign Fund Act of 1966; § 310(f) would have helped to implement such a limitation in the 1967 legislation.

[57] 1967 Hearings, *supra*, at 170.

[58] *Id.* at 181.

We offer this discussion of § 310(f)'s purpose not only because we believe it demonstrates that the language ultimately enacted as § 9012(f) was not intended to limit independent expenditures[59]; in addition, we offer this discussion to show that Congress, in enacting language of such limited purpose, cannot be said to have made a judgment that independent expenditures by political committees presented a risk of corruption or its appearance warranting "prophylactic" legislation. What the Senate Finance Committee apparently hoped to assure in fashioning §310(f) was that the 1967 bill's limitation on the use of private funds to pay for a candidate's campaign expenses would not be undercut by the formal distinction between "authorized" and non-"authorized" political committees. Nor does this history of § 310(f) support the FEC's and Common Cause's claim that § 9012(f) was intended to prevent circumvention of the Fund Act's supposed limitation on the use of private money in publicly financed campaigns generally, because the use of private money that Congress designed § 310(?) to limit was the use of private money to pay for the campaign expenses of a publicly financed candidate, not the use of private money to pay for independent advocacy.

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[59] Construing § 9012(f) not to reach independent expenditures would avoid the need to decide the First Amendment issue. *See Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961); *United States* v. *Rumely*, 345 U.S. 41, 45 (1953); *Crowell* v. *Benson*, 285 U.S. 22, 32 (1932). The district court assumed that § 9012(f) was meant to apply to independent expenditures. Arguments in addition to those presented here that Congress did not intend § 9012(f) to apply to independent expenditures are set out in the briefs of appellees in this Court on the merits in *Common Cause* v. *Schmitt*, Nos. 80-847 & 80-1067 (see Brief of Americans for an Effective Presidency at 10-20; Brief of Harrison H. Schmitt *et al.* at 10-25), although the history of § 310(f) was not canvassed. The district court in *Common Cause* v. *Schmitt* held that § 9012(f)'s "plain terms" precluded any contention that § 9012(f) was not meant to apply to independent expenditures. 512 F. Supp. at 492. The court also asserted that § 9012(f) would be "superfluous" if construed not to apply to independent expenditures, *id.*, on the view that Congress, having forbidden publicly financed candidates from accepting contributions, see 26 U.S.C. § 9012(b), had no reason to make it illegal for non-authorized political committees to make contributions to such candidates.

b. The Purpose Of § 9012(f)

The legislative history reveals very little consideration by Congress of what it hoped § 9012(f) would accomplish. The Fund Act was introduced on the Senate floor by Senator Passore as an amendment to the Revenue Act of 1971, H.R. 10947, 92d Cong., 1st Sess. (1971).[60] Such debate as there was over § 9012(f) in the Senate focused on an unsuccessful amendment to § 9012(f) offered by Senator Taft,[61] who regarded § 9012(f)'s exceptions as indefensibly discriminatory and as calling into question the genuineness of what he regarded as the Fund Act's broad purpose. Thus, Senator Taft complained that, if the purpose of the Fund Act was "to put an overall limit on expenditures in presidential campaigns,"[62] it was irrationally underinclusive for § 9012(f) to be limited to expenditures by political committees. "If there is going to be a limitation," Senator Taft declared, "let there be a limitation and a limitation that is meaningful."[63]

The debate over Senator Taft's proposed amendment to § 9012(f) indicates that he and his supporters viewed § 9012(f) not as being aimed narrowly at preventing sham non-authorized political committees from circumventing the Fund Act's limitations on expenditures by authorized political committees, but instead as being aimed more broadly at preventing circumvention of what they considered the Fund Act's goal of enforcing an "overall" ceiling on expenditures in presidential elections. That is why Senator Taft sought to extend § 9012(f)'s limitations to other organizations: he believed that simply preventing non-authorized political committees from making private expenditures in excess of $1,000

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[60] 117 Cong. Rec. 41,310, 41,758 (1971). The Senate debated Senator Passore's amendment on Nov. 18-19 and Nov. 22, 1971, see 117 Cong. Rec. 41,758-42,033 (1971), and passed the Fund Act by a vote of 52 to 47 on Nov. 22, 1971. *Id.* at 42,033. There was virtually no discussion of the Fund Act in the House after H.R. 10947 returned from conference with Senator Passore's amendment. Opponents of the Fund Act in the House squelched their objections because the plan was not to take effect until the 1976 election and prompt passage of the revenue bill was deemed a priority. See 117 Cong. Rec. 45,862-71 (1971).

[61] *Id.* at 42,397-402.

[62] *Id.* at 42,398.

[63] *Id.*

was an inadequate way of enforcing the Fund Act's "overall limit on expenditures in presidential campaigns."[64]

Not one of § 9012(*f*)'s supporters acknowledged or confirmed that the purpose of § 9012(*f*) was to effectuate any "overall" limitation on the use of private money in publicly financed campaigns, much less a limitation on *independent* expenditures of private money. To the contrary, Senator Pastore, the Fund Act's sponsor, pointedly reminded his colleagues that the Fund Act was "a financing measure; . . . *not* a bill to provide a ceiling,"[65] and he specifically disclaimed any intention to bind "independent organizations and committees" from "furthering the promotion of a particular candidate on their own."[66] Senator Pastore stated that § 9012(*f*) was *not* addressed to "an independent, unauthorized committee that functions on its own, without any contact with the candidate himself"—that is, not addressed to "any group acting on its own."[67]

---

[64] *Id.* at 42,398. *See id.* at 42,399-400 (Sen. Griffin); *id.* at 42,402 (Sen. Dominick). The Court in *Buckley* held this broader purpose invalid. *See e.g.*, 424 U.S. at 57. Senator Taft did not believe that the goal could constitutionally be achieved by limiting expenditures by individuals, *see* 117 Cong. Rec. 42,398 (1971), although Senator Pastore was entirely amenable to such a restriction, accepting an amendment to that effect by Senator Miller without discussion. *Id.* at 42,636. The restriction was removed in conference without explanation. H.R. Rep. No. 708, 92d Cong., 1st Sess. 58 (1971).

[65] 117 Cong. Rec. 41,952 (1971) (emphasis added).

[66] *Id.* at 42,398.

[67] *Id.* at 42,401. Section 9012(*f*)(2)'s exception for expenditures by the news media and tax-exempt organizations communicating their views to their members (added in conference, S. Rep. No. 708, *supra*, at 58) permits expenditures that could be regarded as in-kind contributions—for example, free air time for a candidate, or distribution by a tax-exempt organization to its members of a candidate's campaign literature in a packet of materials "reporting to [its] members the views of the organization with respect to Presidential candidates." *Id.*

Like those who supported limitations on political-committee expenditures during the 1967 hearings, Senator Pastore appears to have been concerned to limit expenditures by a certain *type* of political committee, one that had no life apart from the candidate's campaign but had been "formed for the purpose of directly aiding that candidate." *Id.* The type of committees

(footnote continues)

Whatever Senator Pastore's intentions—and his own statements on the Senate floor are somewhat contradictory[68]—he was fully aware that § 9012(*f*) might be "impinging upon the freedom of speech."[69] Expressing his own anxiety about "the freedom of speech point and how far we may be going to circumvent that,"[70] Senator Pastore confessed: "I do not have the perfect answer."[71] Thus, not only is there no basis for characterizing § 9012(*f*) as designed to effectuate overall restrictions on the use of private money in publicly financed campaigns, much less to prevent corruption or its appearance; § 9012(*f*) also cannot fairly be characterized as any sort of sensitive accommodation to First Amendment values, one designed to go no further than necessary to achieve Congress's purposes.

(footnote continued)

that Senator Pastore may have had in mind were the single-election, will-o'-the-wisp committees—"paper organizations"—that had flourished during the 1968 campaign, *see* H. Alexander, *Financing the 1968 Election* 25 (1971), *e.g.*, the 34 Rockefeller committees established in Delaware, *id.*, and the 21 Nixon-Agnew and 80 Humphrey-Muskie committees formed throughout the Nation. *Id.* at 117-21. As noted above, political committees such as NCPAC and FCM (and *amicus* NCC) came into being long before, and will remain in existence long after, the elections in which they play a role. *Compare New York Times*, Aug. 31, 1971, p. 24 col. 3 (describing "one-shot" character of Democrats for Nixon, and noting that committee had been formed at President's suggestion). *See* note 68, below.

[68] Despite his disclaimer of any intention to bind "independent organizations and committees" from "furthering the promotion of a candidate on their own," 117 Cong. Rec. 42,398 (1971), Senator Pastore also stated that § 9012(*f*) was aimed at "certain parties who have no direct contact with the candidate, but only because they like his views on issues they want to support him." *Id.* at 42,399. Just whom Senator Pastore had in mind is unclear. To the extent that he considered the matter, Senator Pastore could not have had in mind long-lived committees such as appellees, established for ongoing ideological purposes. Such committees were virtually nonexistent in 1971. Of course, drawing any workable distinction between these two types of committees would be problematic, and we doubt that any such distinction would be constitutionally permissible. But the limited nature of Senator Pastore's intentions is critical in determining the purposes of a statute that, as construed, applies to independent expenditures by all "political committees."

[69] 117 Cong. Rec. 42,400 (1971).

[70] *Id.*

[71] *Id.* at 42,401.

It is elementary that "isolated statements" by opponents of a bill "have scant probative value." [72] This Court has " 'often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.' " [73] The failure of a bill's sponsors to affirm the characterization offered by its opponents, the Court has observed, "is pregnant with significance." [74] Here, the only evidence of congressional intent that could arguably support appellants' position appears in "isolated statements" by Senator Taft and his allies, who opposed § 9012(f) as proposed and voted against the Fund Act itself. The proponents of § 9012(f) never claimed that its purpose was to prevent corruption or to impose overall limitations on the use of private money in publicly financed election campaigns; to the contrary, Senator Pastore flatly denied the latter purpose. Certainly there was no "extensive congressional . . . debate" [75] on the purpose of § 9012(f) that lends support to appellants' views. At the same time, the proponents of § 9012(f) frankly acknowledged its First Amendment infirmities.

Thus, it is nothing short of fantasy to urge, as the FEC does, that "Congress debated the proper scope of the limitation in section 9012(f) in light of constitutional concerns, and carefully tailored it to counter the particular problem at which it was aimed without infringing on the ability of citizens to engage freely in political speech." (FEC at 4-5.) The truth is that Senator Pastore mechanically included § 9012(f) in the Fund Act only because it had been in the 1967 legislation; that it had been in the 1967 legislation to address a problem subsequently solved by the distinction between independent expenditures and in-kind contributions in FECA; that no one ever identified corruption or "prophylactic" concerns as a reason for its

[72] *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 639 (1967).

[73] *Id.* at 639-40 (citation omitted).

[74] *Id.* at 640 (citation omitted).

[75] *Id.*

enactment; and that its supporters conceded that they could not meet the First Amendment difficulties it presented.

III. SECTION 9012(f) IS NOT INTEGRAL TO THE FUND ACT'S PUBLIC-FINANCING SCHEME.

Undoubtedly because they recognize that § 9012(f) cannot be defended on its own terms as a campaign-expenditure limitation, appellants seek to portray it as a necessary element of the Fund Act's general scheme for optional public financing of presidential election campaigns; indeed, the FEC goes so far as to claim that § 9012(f)'s expenditure limitation is "crucial to the success of the [public-financing] scheme." (FEC at 14.) This claim is manifestly without merit. Even if it were correct it would be insufficient to sustain § 9012(f).

The Fund Act "is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Buckley*, 424 U.S. at 92-93. Its policy is not, as the appellants suggest, to mandate public campaign financing as an end in itself, but rather to make such financing available—on an optional and limited basis—as "a means of eliminating the improper influence of large private contributions," *id.* at 96, and as "[a] . . . means of relieving major-party Presidential candidates from the rigors of soliciting private contributions." *Id.*

A limitation on independent expenditures by political committees that are neither controlled by nor coordinated with a candidate or his authorized political committees simply does not serve either of these aims, and neither aim would be frustrated in the absence of the limitation imposed by § 9012(f), as construed. Far from lying at the core of the public-financing scheme, § 9012(f) is at war with the Fund Act's most fundamental purpose—that of enhancing "discussion and participation in the electoral process." *Id.* at 93. As construed, § 9012(f) is ultimately defensible only on the theory that, without the limitation it would impose, there will either be

too much speech or unequal speech. As discussed above, this Court has already rejected such justifications.[9]

If § 9012(f)'s limitation on independent expenditures by political committees were deemed vital to the effectiveness of the public-financing scheme, the result would be not to save § 9012(f), but to call the validity of the public-financing scheme itself in question. This Court in *Buckley* held the financing scheme constitutional, in part, because the expenditure limit it imposes on a publicly funded presidential candidate is one to which the candidate "voluntarily assents." 424 U.S. at 99. To permit the candidate's voluntary acceptance of that limit to extinguish the rights of those independently seeking to advocate his cause would, as noted above, sanction an impermissible abridgment of their First Amendment rights. Thus, the appellants gain nothing from linking the fate of public financing to § 9012(f), for even if the link were real—which it is not—the connection would bring down the entire structure.

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[9] Common Cause claims that § 9012(f) must be sustained lest independent expenditures of private money "swamp the public grant." (CC at 32.) This argument is without merit. Just as the inherent worth of speech does not depend on the identity of the speaker, *Bellotti*, 435 U.S. at 775, so it cannot turn on whether speech is made possible by public or private money. Common Cause surely does not mean to suggest that Congress could determine the extent of election-campaign debate by the amount of public funding it makes available. There is no suggestion, either, that privately financed advocacy threatens to prevent publicly funded presidential or vice-presidential candidates from carrying their message to the electorate.

CONCLUSION

For the foregoing reasons, the Court should hold that § 9012(f) does not limit independent expenditures by political committees; alternatively, the district court's judgment should be affirmed.

Respectfully submitted,

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Appendix A

Letter of Oct. 8, 1976, from
Assistant General Counsel Litchfield
to Donald Cox, Esq.

FEDERAL ELECTION COMMISSION

1325 K Street, N.W.
Washington, D.C. 20463

8 Oct. 1976

Donald Cox
Lynch, Sherman, Cox & Fowler
Suite 414 Marion E. Taylor Bldg.
Louisville, Kentucky 40202

Dear Mr. Cox:

This responds to your letter of September 13, 1976, requesting confirmation of a recent telephone conversation with Paul Kamenar concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"). You ask whether an unauthorized political committee may make independent expenditures in excess of $1,000 on behalf of a presidential candidate in the general election.

Under 2 U.S.C. § 431(p) and § 109.1(a) of the Commission's proposed regulations, the term "independent expenditure" is defined as

> an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate and which is not made in concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate.

Some members of the Commission have voiced doubts concerning the constitutionality of 26 U.S.C. § 9012(f), and the Commission has taken the position that this section does not apply to independent expenditures. See Part 109 of the proposed regulations. Section 110.7(b)(5) of the proposed regulations is based, in part, on 26 U.S.C. § 9012(f).

For your further information I am enclosing copies of the Commission's response to AOR 1976-20 and a policy statement setting forth the contribution limits that apply to persons who make contributions to a committee making independent expenditures. This response is for informational purposes only. I hope it is helpful for purposes of your inquiry.

Sincerely yours,

/s/ N. BRADLEY LITCHFIELD

N. Bradley Litchfield
Assistant General Counsel

Enclosure

AMICUS CURIAE

BRIEF

Nos. 83-1032 & 83-1122

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION,
Appellant,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,
Appellees.

DEMOCRATIC PARTY OF THE UNITED STATES, *et al.*,
Appellants,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,
Appellees.

On Appeals From The United States District Court For The Eastern District Of Pennsylvania

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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On Appeals From The United States District Court For The Eastern District Of Pennsylvania

---

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

The American Civil Liberties Union submits this brief as *amicus curiae* in support of the judgment of the United States District Court for the Eastern District of Pennsylvania declaring that 26 U.S.C. § 9012(f) is an uncon-

stitutional abridgment of the freedoms of speech and association safeguarded by the First Amendment.

INTEREST OF *AMICUS CURIAE* [1]

The American Civil Liberties Union (ACLU) is a nationwide, non-profit organization with more than 200,000 members. For more than sixty years, the ACLU has been dedicated to upholding and protecting the First Amendment rights of all persons, irrespective of their partisan political interests or affiliations.

In defense of the fundamental First Amendment right of individuals and associations to engage in political expression, the ACLU has been an active participant in litigation involving the constitutionality and interpretation of the federal election laws. The New York Civil Liberties Union, an affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976), the landmark challenge to the constitutionality of the 1974 amendments to the Federal Election Campaign Act and the Presidential Election Campaign Fund Act. The ACLU participated as *amicus curiae* both before the district court and this Court in *Common Cause v. Schmitt*, 512 F. Supp. 489 (D.D.C. 1980) (three-judge court), *affirmed by an equally divided Court*, 455 U.S. 129 (1982), the prior litigation concerning the constitutionality of section 9012(f). In addition, the ACLU and the ACLU of Greater Philadelphia, participated as *amici curiae* before the district court in these consolidated cases on the issue of the constitutionality of section 9012(f)'s $1,000 limitation on independent expenditures—the principal question presented by these consolidated appeals.[2]

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[1] Letters from counsel for each of the parties consenting to the filing of this *amicus* brief have been submitted to the Clerk of the Court.

[2] *Amicus* does not address the question presented by the Federal Election Commission regarding the propriety of the private plaintiffs' suit under 26 U.S.C. § 9011(b).

SUMMARY OF ARGUMENT

The statutory provision at issue in these appeals, 26 U.S.C. § 9012(f), makes it a crime for any group to spend more than $1,000 on independent advocacy of presidential candidates who have chosen to accept federal financing for their general election campaigns. This provision has the practical effect of barring any effective independent group political expression in support of major party candidates for our nation's highest office. Like the $1,000 limitation on independent political expenditures ruled unconstitutional by this Court in *Buckley v. Valeo*, *supra*, section 9012(f) directly and drastically restricts the exercise of fundamental First Amendment freedoms of political speech and association. *See* pp. 5-17, *infra*.

Section 9012(f)'s abridgement of these basic freedoms cannot survive the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley v. Valeo*, *supra*, 424 U.S. at 44-45. Each of the governmental interests asserted by appellants in an effort to sustain section 9012(f)'s expenditure limitation—elimination of corruption and the appearance of corruption in presidential campaigns and preservation of the integrity of the public financing provisions of the Presidential Election Campaign Fund Act—has been considered and rejected as inadequate to justify direct limits on political expression. *Buckley v. Valeo*, *supra*, 424 U.S. at 39-59; *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280, 285-286 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980). *See* pp. 17-27, *infra*.

ARGUMENT

Section 9012(f), a part of the Presidential Election Campaign Fund Act (the "Fund Act"), makes it a crime for any association or group of persons to spend more

than $1,000 to further the election of a presidential candidate who has chosen to accept federal funding for his general election campaign.[3] Section 9012(f)(3) threatens the individuals who are involved in this crime with imprisonment for up to a year, plus a stiff fine. This stringent prohibition on political expression restricts the political activism of any "unauthorized" political committee—a concept that reaches any group of persons, whether formal or ad hoc, that seeks to influence the electorate, but has not been authorized in writing by the candidate to incur expenses to further his election. *See* 26 U.S.C. §§ 9002(1),(9); 11 C.F.R. §§ 100.5, 9002.9 (1983).[4] The statute cannot withstand the "exacting scrutiny applicable to limitations on core first amendment rights of political expression". *Buckley v. Valeo*, *supra*, 424 U.S. at 44-45.[5]

[3] Section 9012(f) states in pertinent part:

"[I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000."

[4] Section 9002(9) defines "political committee" to mean:

"any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." (Emphasis added).

Section 9002(1) defines "authorized committee" to mean:

"with respect to the candidates of a political party for President and Vice President of the United States, any political committee which is authorized in writing by such candidates to incur expenses to further the election of such candidates. . . ."

[5] Appellants rely upon a potpourri of supposedly relevant factors in urging this Court to examine section 9012(f) under a less searching standard of review, including (1) the truism that a statute is presumed constitutional; (2) the observation that its restrictions are "content neutral," and (3) the

(footnote continued)

I. SECTION 9012(f) SEVERELY RESTRICTS THE EXERCISE OF FUNDAMENTAL FREEDOMS OF SPEECH AND ASSOCIATION IN PRESIDENTIAL CAMPAIGNS.

A. Section 9012(f) Is Virtually Identical To The Expenditure Limitation Invalidated In *Buckley*.

In *Buckley v. Valeo*, *supra*, this Court examined a wide array of contribution and expenditure limitations enacted by Congress as part of the 1974 amendments to the Federal Election Campaign Act ("Campaign Act"). The Court concluded that, although limitations upon political contributions and limitations upon political expenditures both "implicate fundamental First Amendment interests," the "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do [the Campaign Act's] limitations on financial contributions" to candidates or their campaign committees. 424 U.S. at 23. The Court's lengthy analysis of expenditure limitations similar to the one at issue here, particularly the Campaign Act's $1,000 limit on independent expenditures, is controlling in this case. *See id.* at 39-51.

This Court emphasized in *Buckley* that the various expenditure limitations contained in the Campaign Act posed "substantial rather than merely theoretical restraints on the quantity and diversity of political speech."

(footnote continued)

claim that Congress took constitutional concerns into account in enacting the challenged provision. Brief filed by the Federal Election Commission ("FEC Br.") at 8, 13; Brief filed by the Democratic Party of the United States, *et al.*, ("Democratic Party Br.") at 7-8, 9, 12.

These factors all were present in *Buckley v. Valeo*, *supra*, and did not deter the Court from subjecting the provisions at issue in that case to "exacting scrutiny." Section 9012(f) should be measured against the same strict standard. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981) ("regulation of First Amendment rights is always subject to exacting judicial review") (emphasis added). *See also* p. 18, n.12 *infra*.

Id. at 19. As the Court noted, "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Id.* Thus, a

> "restriction on the amount of money a person *or group* can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* (emphasis added).

Applying constitutional principles to these realities of political life, the Court forcefully concluded:

> "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates *and collectively as associations and political committees*—who must retain control over the quantity and range of debate on public issues in a political campaign." *Id.* at 57 (emphasis added).

The most debilitating of the expenditure limitations addressed by the Court in *Buckley* was the $1,000 ceiling then imposed by 18 U.S.C. § 608(e)(1) on independent expenditures in support of any candidate for federal office. The Court recognized that this limit excluded most citizens and groups from use of effective means of communication. 424 U.S. at 19-20. By stifling political expression by groups, section 608(e) also had a devastating effect on the fundamental right of association. *Id.* at 22. Accordingly, the Court declared section 608(e) unconstitutional. *Id.* at 51. All of those observations apply equally to Section 9012(f).

B. This Court's Decisions Since *Buckley* Confirm That Section 9012(f) Is Unconstitutional.

In *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981), the Court examined a federal election law provision that prohibited individuals and associations from contributing more than $5,000 per year to any multicandidate political committee. In upholding this limitation on political contributions, the plurality reaffirmed *Buckley's* holding that limitations on direct political expenditures are decisively different from limits on contributions to candidates. *Id.* at 194. Justice Blackmun concurred in the judgment, emphasizing that the First Amendment would bar a limitation on "contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates." 453 U.S. at 203. Thus, the prohibition in section 9012(f) against political expenditures by independent groups is precisely the type of restraint that a majority of the Court agreed would be constitutionally impermissible.

More recently, the Court in *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), invalidated a local ordinance that limited contributions to committees formed for the purpose of making expenditures supporting or opposing ballot measures. The Court underscored the vital role of group expression, observing that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Id.* at 294. It is such group advocacy that section 9012(f) seeks to make criminal.[9]

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[9] Although *Citizens Against Rent Control* involved a restriction of contributions to further group expression on ballot measure questions, the Chief Justice's opinion for the Court noted that the tradition of group expression protected by the First Amendment clearly encompasses advocacy of candidates for public office. 454 U.S. at 294. *See also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

C. Groups Are Entitled To Engage In Constitutionally Protected Speech.

Appellants attempt to avoid the devastating effect of these decisions upon their position by asserting that the Court should treat section 9012(f) as a contribution limitation rather than as a limitation upon expenditures. They claim that because in some associations members do not control the activities of the group to which they contribute, the group's speech is only "proxy speech" entitled to a lesser degree of constitutional protection. *See* FEC Br. at 38-39; Democratic Party Br. at 12-17; Brief filed by *Amicus Curiae* Common Cause ("Common Cause Br.") at 39, 41. Appellants appear to urge a view that would make First Amendment protections available only to individual efforts by natural persons to engage in political expression. The fatal flaw in that argument is that it completely ignores the drastic effect of section 9012(f) upon the free speech rights of groups and upon contributors' associational freedoms.

It is surprising that Common Cause and the Democratic Party of the United States—two organizations dedicated to speaking out upon important matters of public concern—would espouse so atomistic an interpretation of the First Amendment that provides no protection for group expression. For example, since it is doubtful that the brief filed by Common Cause in this Court has been reviewed and approved by that organization's 260,000 members, the brief would constitute only "proxy speech" under appellants' approach and thus would, supposedly, not be entitled to rigorous First Amendment protection. *See also Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (upholding the Democratic Party's associational rights under the First Amendment).

Fortunately, this Court's decisions foreclose appellants' restrictive approach to freedom of speech. The

activities of organizations as well as those of individuals are protected under the First Amendment. *E.g., Citizens Against Rent Control v. Berkeley*, *supra*, 454 U.S. at 299-300; *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual"). Since the expenditure limitation imposed by section 9012(f) severely restricts the speech of any group or association, it constitutes a substantial infringement upon core First Amendment rights.

Section 9012(f)'s adverse effect upon freedom of association is illustrated by the *Buckley* Court's discussion of this fundamental right. The Court noted that a restriction on the amount that an individual could donate to a committee or candidate did not constitute a severe infringement upon the freedom of association because the contribution limitation did not prohibit the aggregation of "large sums of money to promote effective advocacy." 424 U.S. at 22. The Court's analysis was quite different, however, when it turned to the separate, $1,000 limitation upon group expenditures:

> "By contrast, the Act's $1,000 limitation on independent expenditures 'relative to a clearly identified candidate' precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. *See NAACP v. Alabama*, 357 U.S., at 460. *The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents.'*" *Id.* at 22 (*quoting Sweezy v. New Hampshire*, 354 U.S.

234, 250 (1957) (plurality opinion)) (emphasis added). *See also Buckley*, *supra*, 424 U.S. at 15, 65.

Section 9012(f) imposes the identical limitation upon independent group expenditures in support of a presidential candidate who has agreed to receive public funding, and would have the same debilitating effect upon the associational rights of contributors to such independent groups. By curtailing an independent group's ability to expend funds to advocate the election of a presidential candidate, the provision would have a draconian effect upon both the freedom of individual citizens to associate to pursue effective political advocacy and the right of organizations that have legally raised substantial funds to expend those sums in the exercise of their freedom of speech.

Appellants respond that these settled principles, which this Court has applied consistently in election law cases, were overturned by *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982). In that case the Court upheld a provision of federal law barring corporations and labor unions from soliciting contributions from persons other than their shareholders or members, 2 U.S.C. § 441b. That decision, however, is consistent with the principles discussed above and provides no basis for sustaining section 9012(f).

The restriction upheld in *National Right to Work Committee* differs from section 9012(f) because it has an almost negligible impact upon rights protected under the First Amendment. It applies only to the accumulation and use of funds for political purposes by corporations and unions. Moreover, corporations and unions remain free to establish related political action committees to conduct

such political activities. *See Federal Communications Commission v. League of Women Voters*, ___ U.S. ___, 52 U.S.L.W. 5008, 5017-18 (U.S. July 2, 1984) (ability to form affiliated entity to carry out protected activity will lessen vulnerability to first amendment challenge of carefully tailored restrictions on organization's communication of ideas); *Regan v. Taxation with Representation*, ___ U.S. ___, 76 L. Ed.2d 129, 141-42 (1983) (concurring opinion). The over 2,000 political committees affiliated with corporations and unions (FEC Br. at 28) are evidence that the provision at issue in *National Right to Work Committee* has had little impact upon the exercise of First Amendment rights of speech and association.

Section 9012(f), by contrast, would have a severe effect upon the rights of free association and free speech. It would restrict virtually all forms of expression by groups not formally aligned with a candidate's own official campaign committee. This broad intrusion upon First Amendment rights could be justified only by an especially compelling government interest. As discussed below, the purposes upon which the Court in *National Right to Work Committee* relied in upholding limitations on the political activities of corporations and labor unions cannot save section 9012(f). *See* p. 22, *infra*.

D. Section 9012(f) Would Preclude Virtually All Independent Group Advocacy In Connection With The General Election Campaign For Our Nation's Highest Office.

The restriction upon protected political expression wrought by section 9012(f) is drastic. Indeed, both because of the minimal level of expression that the provision permits and the sweeping range of independent groups that fall within its terms, it is hard to imagine a tighter noose on the neck of vital constitutional guarantees than the constraint on independent expenditures imposed by section 9012(f).

A maximum allowance of $1,000 is simply an empty gesture toward expression by independent groups. Inflation has reduced the $1,000 ceiling by almost sixty percent since this provision was enacted by Congress in 1971. *See Economic Report of the President*, Table B-52 (1984). In January 1976, when this Court decided *Buckley*, the $1,000 expenditure ceiling would have precluded political committees from taking out a single quarter-page advertisement in virtually any metropolitan newspaper in the country. *Buckley v. Valeo*, *supra*, 424 U.S. at 40; *see Citizens Against Rent Control v. Berkeley*, *supra*, 454 U.S. at 296 n.5. In October 1983, the cost of such a quarter-page advertisement in *The Philadelphia Inquirer* was almost $4,400. Joint Appendix ("J.A.") at 61. In fact, an independent group would not even be able to purchase an advertisement in that newspaper the size of the caption on the cover of the Joint Appendix filed in this case. J.A. at 61, 63. Effective television advertising is similarly out of reach. Last year, the cost of the air time to broadcast a single thirty-second advertisement on a network-affiliated television station during prime time was approximately $4,000. J.A. at 61.[7] Thus, as a practical matter, section 9012(f) is equivalent to a total ban on any meaningful independent group expression in support of presidential candidates who accept public funding.

The prohibition sweeps quite broadly. Section 9012(f) applies to "*any committee, association, or organization* (whether or not incorporated) which accepts contributions *or* makes expenditures for the purpose of influencing, *or attempting to influence*" any federal, state or local election. 26 U.S.C. § 9012(f) (emphasis added).

[7] These figures do not include the cost of producing the advertisements or of employing an expert to advise the group concerning the effective use of the media. Thus, they actually overstate a group's purchasing power under the $1,000 limitation.

Regulations issued by the Federal Election Commission (FEC) reflect the sweep of the statutory language, stating that the term "political committee," as employed in section 9012(f), reaches "*any* committee, club, association, organization or *other group of persons.*" *See* 11 C.F.R. §§ 100.5, 9002.9 (1983) (emphasis added). As the FEC explained when it promulgated these regulations, this definition is "in concert with the definition of political committee" in the Campaign Act, now codified at 2 U.S.C. § 431(4)(A), which explicitly applies to any "group of persons." 45 Fed. Reg. 43371, 43372 (1980).

Despite the broad, unequivocal language in both the statute and regulations, appellants have portrayed section 9012(f) as a modest and carefully tailored provision. Common Cause argues that "groups of individuals" who retain control over their expenditures are exempt from the provision. Common Cause Br. at 35-36. The Democratic Party asserts that "only one special organizational form, the PAC" is included within the prohibition, but adopts a standard similar to the one put forward by Common Cause. Democratic Party Br. at 7, 14.

The legislative history of section 9012(f), however, does not support the limitations urged by Common Cause and the Democratic Party.[8] Moreover, such an approach would render the statute unconstitutionally vague because

[8] Before conference, the House and Senate bills placed a $1,000 ceiling on all expenditures in support of a presidential candidate who accepted federal funding. S. Rep. No. 553, 92d Cong., 1st Sess. 57 (1971); H.R. Rep. No. 708, 92d Cong., 1st Sess. 57 (1971). The bills were amended in conference to eliminate the limitation on expenditures by individuals and to make clear that the limitation on organizations did not apply to broadcasting organizations, periodicals, or tax-exempt organizations reporting to their members. S. Rep. No. 553, *supra*, at 58; H.R. Rep. No. 708, *supra*, at 58. The conference reports do not refer to an exception for organizations in which the individual members retain control over their funds. S. Rep. No. 553, *supra*, at 56-59; H.R. Rep. No. 708, *supra*, at 56-59.

of the uncertainty created by appellants' proffered "retention of control" standard.[9] As the three-judge court below found, the broad language of the statute admits of no distinction between informal close-knit associations and sophisticated, broad-based organizations. *See* FEC J.S. App. at 88a, 92a. *Accord Common Cause v. Schmitt, supra*, 512 F. Supp. at 492.

Even the FEC, which once urged this Court to adopt a limiting construction of section 9012(f), now acknowledges the provision's "broad" scope. *Compare* Brief for Appellant Federal Election Commission at 45 n.66, in *Federal Election Commission v. Americans for Change*, 445 U.S. 129 (1982) ("[t]he statute does not limit a group of individuals . . . . so long as the individual participants retain control over their funds") *with* FEC Br. at 31 & n.20 (noting that, as its own regulations reflect, the definition of "political committee" under the statute is "broad" and advancing no principle limiting section 9012(f)). The FEC attempts to avoid the broad sweep of

[9] Appellants' test provides no indication of where, on the continuum between a multi-million dollar media campaign funded by a nationwide committee with thousands of adherents and a political pamphlet drafted and funded jointly by a handful of like-minded neighbors, individual adherents yield enough "control" to others so that the group becomes subject to section 9012(f)'s criminal penalties. *See, e.g., Buckley v. Valeo, supra*, 424 U.S. at 41 n.48; *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

The availability of FEC advisory opinions does nothing to lessen the chill on First Amendment rights resulting from this vague distinction, especially in the campaign context where the value of speech is lost if it is not communicated promptly. For example, because the FEC has sixty days in which to issue such an advisory opinion, a request for an opinion filed at the start of the general election campaign season in September might not be answered until after election day in November. Indeed the possibility that speech may be delayed or ultimately prevented because of a governmental body's interpretation of an ill defined statute highlights the flaws of section 9012(f).

the provision by stating that it does not intend to prosecute groups of individuals who retain joint control over their political expression. FEC Br. at 34. A statement of present prosecutorial intentions, however, especially one coming from the FEC, which does not control criminal prosecutions, cannot legitimize a statutory provision that threatens groups of citizens engaging in political expression with criminal penalties.

Furthermore, appellants' arguments rest on a fundamental misunderstanding of the First Amendment. They assume, erroneously, that the First Amendment permits restrictions on independent political expression by associations when the restrictions are pegged to the effectiveness of the organization or to its members' control over, and the extent of their participation in shaping, the content of the organization's political expression. Nothing could be more foreign to the First Amendment. As the three-judge court pointedly observed in *Common Cause*: "Since it is beyond contention that individuals and 'informal groups' may make unlimited independent expenditures to express their First Amendment rights, political committees may not be denied the same right merely because they are *efficient* groupings of like-minded individuals." 512 F. Supp. at 497 (emphasis in the original). *Accord Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 533 (1980); *First National Bank v. Bellotti, supra*, 435 U.S. at 776-78.

Appellants would deny First Amendment rights of free expression to all mass associations, since it would be impossible for all or even most of the supporters of such organizations jointly to draft its political communications or to review and comment on them before they are made. Section 9012(f), even as narrowed by appellants' proffered construction, thus would prevent most organizations from "effectively amplifying the voice of their adher-

ents"—"the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley v. Valeo*, *supra*, 424 U.S. at 22, *citing NAACP v. Alabama*, *supra*, 357 U.S. at 460.

While section 9012(f) does not apply to independent expenditures by individuals, this aspect of the provision does little to mitigate its drastic curtailment of political expression and association. As the Court emphasized in *Buckley*, the "electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19. Only a tiny fraction of Americans can afford, as individuals, to utilize the expensive means of communication that are essential to effective political advocacy in a presidential election campaign. The very existence of groups like Common Cause and the Democratic Party reflects the fact that the great majority of citizens can participate effectively in our nation's political dialogue only by banding together to pool their resources in order to communicate.[10]

The vast bulk of the contributors to the groups that are the appellees in these cases donated amounts of less than $1,000. Stipulation ¶¶ 149-151, 168-172, 202 at J.A. 49, 53, 57. As we have seen, even a $1,000 expenditure will have a minimal impact in conveying a speaker's message. Thus, if section 9012(f)'s prohibition upon group expenditures stands, the voices of these individuals who can only spend less than $1,000 personally on a

[10] This fact undoubtedly was recognized by many of the 143,000 persons who contributed to the National Conservative Political Action Committee during the 1981-2 election cycle. *See* J.A. at 57.

political cause will become "faint or lost" in the debate regarding candidates for our nation's highest office.[11]

II. SECTION 9012(f) SERVES NO COMPELLING GOVERNMENTAL INTEREST.

Section 9012(f) can be upheld, therefore, only if it serves a compelling governmental interest. This is a test that the provision cannot survive. None of the governmental interests advanced in support of section 9012(f) justify its draconian limitation on expenditures by independent political groups. Indeed, the governmental interests relied upon to support section 9012(f) are substantially weaker than those previously rejected as insufficient by this Court in other election law cases.

A. Elimination Of Corruption And The Appearance Of Corruption.

The "sole governmental interest" that this Court has "recognized as a justification for restricting contributions [is] the prevention of *quid pro quo* corruption between a

[11] Appellants suggest that the incursion upon First Amendment rights resulting from section 9012(f) is counterbalanced by the speech-facilitating effect of the statute's public financing provisions, and conclude that section 9012(f) therefore does not infringe upon constitutionally protected rights. *E.g.*, Democratic Party Br. at 9, 21. However, First Amendment rights cannot be toted up as cavalierly as gains and losses in a poker game. The general benefit to society flowing from an increase in a candidate's spending ability cannot be grounds for depriving others of their First Amendment rights. In *Republican National Committee v. Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980), the three-judge court, whose decision this Court unanimously affirmed, upheld the ban upon contributions to a candidate receiving public financing only after concluding that would-be contributors to that candidate could express their support in other ways, such as by making independent expenditures. 487 F. Supp. at 286. The court obviously concluded that public financing itself did not justify the wholesale elimination of these supporters' First Amendment rights. Section 9012(f)'s elimination of rights guaranteed by the First Amendment similarly cannot be justified by invoking the goal of public financing.

contributor and a candidate." *Citizens Against Rent Control v. Berkeley*, *supra*, 454 U.S. at 297, *quoting Let's Help Florida v. McCrary*, 621 F.2d 195, 199 (5th Cir. 1980), *aff'd sub. nom. Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982). The elimination of corruption and the appearance of corruption, however, cannot justify the restrictions on First Amendment freedoms imposed by section 9012(f).[18]

Like the independent expenditure limitation struck down by the Supreme Court in *Buckley*, section 9012(f) only applies to expenditures that are "made totally independently of the candidate and his campaign." *Buckley v. Valeo*, *supra*, 424 U.S. at 47. Section 9012(f) does not reach expenditures made at the direction of or in coordination with the candidate or the candidate's official campaign. Such coordinated expenditures are treated as contributions and, as such, are prohibited absolutely by other provisions of the Fund Act if the presidential candidate has chosen to accept federal funding. 26 U.S.C. §§ 9003(b)(2), 9012(b); 11 C.F.R. § 9002.13 (1983); *see Buckley v. Valeo*, *supra*, 424 U.S. at 46-47 n.53.

Since section 9012(f) only applies to advocacy that is independent, it does not reach any activity that poses "dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Buckley v. Valeo*, *supra*, 424 U.S. at 46. As this Court observed in *Buckley*, "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 47. *See* Stipulation ¶ 60 at J.A. 34 (Chairman of Republican National Committee complaining about the activities of independent groups).

Moreover, the risk of actual or apparent corruption is even more attenuated than in *Buckley*. Section 9012(f) applies only if a presidential candidate has chosen to accept public financing, which will furnish him more than $40,000,000.[19] The provision of such massive public funding to a candidate greatly diminishes any possibility that the candidate might become indebted to persons or groups making even large-scale independent expenditures in support of his election.

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[18] Contrary to appellants' claims that this Court must defer to a congressional determination that section 9012(f) is necessary to prevent corruption, this Court should ascertain for itself whether section 9012(f) is justified as an anti-corruption measure. When First Amendment rights are infringed by a statute under review, this Court consistently has examined the interests put forward to justify the incursion upon the constitutionally-protected rights. For example, in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the Court rejected the argument that a prior restraint upon speech could be justified by a legislative finding of the existence of a "clear and present danger." *Id.* at 842-46. The Court affirmed that "the judicial function commands analysis of whether . . . the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Id.* at 844.

The decision in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), upon which appellants rely, does not alter this longstanding rule. The Court in that case simply declined to "second guess" the precise means used by Congress to eliminate the possibility of corruption; it did not cede responsibility for evaluating the compelling interest underlying the provision. *Id.* at 209-210. If the legislature's invocation of an anti-corruption rationale was by itself sufficient to justify infringement of First Amendment rights, the *Buckley* Court would not have invalidated the restriction on independent expenditures then contained in 18 U.S.C. § 608(e), and Congress and the state legislatures would be free to enact any restrictions upon campaign contributions and expenditures so long as they take care to sprinkle this talismanic purpose throughout the legislative history.

[19] The Fund Act specifies that the amount of public financing provided to each major party candidate for the general election campaign is to be adjusted in proportion to changes in the consumer price index. *See* 26 U.S.C. § 9004(a)(1); 2 U.S.C. §§ 441a(c)(1)(B), 441a(c). In 1980, each of the two major party candidates received $29,440,000. Increases in the consumer price index will boost this amount to over $40,000,000 for the 1984 election.

Appellants have failed to demonstrate that independent expenditures lead to corruption or the appearance of corruption. The district court reviewed their "evidence,"—which amounted to claims that some persons who were ideologically compatible with the President received appointments and assertions that persons related to independent groups received private briefings—and found that there was no showing of corruption or its appearance. FEC J.S. App. at 61a-75a.[14] In addition, appellants have not shown that these alleged "favors" resulted from expenditures that would be barred by section 9012(f) rather than from appellees' activities during the primary and convention seasons, which would not be affected by section 9012(f). *See* pp. 21-22, *infra*.

Even if independent expenditures did pose a significant risk of actual or apparent corruption, section 9012(f) could not be upheld. In *Buckley*, the Court found that the independent expenditure limitation in section 608(e) could not be sustained as an anti-corruption provision because it could be readily evaded. 424 U.S. at 45.[15] Section 9012(f) provides far less protection against attempts to secure influence than the expenditure limitation struck down as ineffectual by the Court in *Buckley*.

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[14] Appellants erroneously claim that the district court insisted upon proof of actual corruption in order to uphold the statute. The district court's opinion repeatedly refers to "corruption or the appearance of corruption." *See, e.g.*, FEC J.S. App. at 57a, 61a, 75a.

[15] To avoid serious vagueness problems, the Court in *Buckley* construed section 608(e) to apply only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44. In order to avoid the similar vagueness problems posed by section 9012(f)'s limitation on expenditures that "further the election" of a publicly-funded candidate, section 9012(f) also would have to be confined to expenditures that expressly advocate the election or defeat of clearly identified candidates. "The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines [section 9012(f)'s] effectiveness . . . by facilitating circumvention by those seeking to exert improper influence upon a candidate or officeholder." *Buckley v. Valeo*, 424 U.S. at 45.

First, section 9012(f) does not apply to independent expenditures by individuals. This glaring gap in coverage strongly suggests that section 9012(f) was not really intended to prevent the corrupt purchase of influence. At least, this exclusion renders section 9012(f) both ineffectual and unjustifiable as an anti-corruption measure. As the Court observed in *Citizens Against Rent Control v. Berkeley*, *supra*, 454 U.S. at 296, "[t]here are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." Second, section 9012(f) does not apply to presidential primary campaigns, and it only applies in the general election to candidates who are eligible for and who choose to accept federal financing. Yet, independent expenditures at the primary or convention stages of presidential campaigns would appear to pose as great a risk of corruption as that raised by expenditures covered by section 9012(f). Third, section 9012(f) is also grossly underinclusive as an anti-corruption measure because it does not apply to internal communications by labor unions, corporations, or membership organizations. *See* 2 U.S.C. §§ 431(8)(B)(vi), (9)(B)(i), (9)(B)(iii), 441b(b)(2)(A).

Much of the "evidence" of "corruption" or the "appearance of corruption" upon which appellants rely concerns campaign expenditures that would not be prohibited by section 9012(f). Many of the specific expenditures by independent groups cited by appellants occurred during the primary campaign or the political conventions, and therefore would not be barred by section 9012(f). *E.g.*, Stipulation of Fact ¶¶ 41-42, 47, 92-99, 103, 158-59 at J.A. 30-31, 38-40, 50-51. The "Reagan fundraisers" whom Common Cause cites as examples of patronage appointments (Common Cause Br. at 13-14) either made individual contributions not covered by Section 9012(f) or raised funds before the start of the general election campaign

(*id.*). As the district court observed, "the plaintiffs have produced no evidence" concerning [untoward] independent expenditures during the general election. FEC J.S. App. at 74a.

Appellants again seize upon *Federal Election Commission* v. *National Right to Work Committee*, *supra*, to justify their position, but that decision cannot save section 9012(f). In that case the Court accepted the government's argument that the provision reflected two special concerns: first, ensuring that funds accumulated through "the special advantages which go with the corporate form of organization" are not used to incur political debts from legislators, and, second, protecting "the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." 459 U.S. at 207-208. Those purposes reflect Congress' desire to prevent corporations and unions from acquiring funds through commercial or organizing activities and then using those funds to influence the electoral process. They are not relevant here, where the statute applies to *all* groups, including those that do not utilize the corporate form and that inform their contributing members that they engage solely in political activity.

In view of the foregoing, the provision cannot be sustained as necessary to promote the governmental interest in combating corruption. Indeed, the limitations upon section 9012(f) indicate that the provision was not even intended as an anti-corruption measure, but instead was enacted for the constitutionally impermissible purpose of preventing independent advocacy of candidates who have chosen to receive public financing.

B. Preservation Of The Integrity Of The Fund Act.

The other justification advanced by appellants to support section 9012(f)—and to distinguish section 9012(f) in the face of *Buckley*'s declaration that limitations on independent political expression are unconstitutional—is that section 9012(f) is necessary to the Fund Act's system of public financing of presidential elections. This argument provides no grounds for upholding the expenditure ceiling imposed by section 9012(f).

1. Inclusion of Section 9012(f) as Part of the Public Financing Statute.

In *Buckley*, the Court addressed a variety of challenges to the use of federal funds to finance presidential election campaigns. In upholding the basic public financing provisions, the Court stressed that those provisions represented "a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." 424 U.S. at 92-93. Therefore, section 9012(f)—which restrains rather than enlarges public discussion—cannot be sustained simply because it was enacted along with the basic public financing provisions upheld in *Buckley*.

Moreover, while *Buckley* did uphold an expenditure limitation on campaign spending by presidential candidates who apply for public funding, both *Buckley* and the subsequent decision in *Republican National Committee* make clear that this ceiling on the candidate's own spending survives First Amendment scrutiny only because the candidate *voluntarily* chooses to accept the public funding alternative that triggers the limitations on his own campaign activities. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 57 n.65; *Republican National Committee* v. *Federal Election Commission*, *supra*, 487 F. Supp. at 285. The candidate's choice to accept federal funds, however, may not constitutionally diminish the rights of his supporters to make independent political expenditures—expenditures that section 9012(f) would make criminal. As the three-judge court concluded in *Republican National Committee*

v. *Federal Election Commission*, regardless of how the candidate exercises his own freedom of choice, the candidate's supporters must be left " 'free to engage in independent political expression,' " including "'uncoordinated expenditures . . . *without limit*.'" 487 F. Supp. at 286, quoting *Buckley* v. *Valeo*, supra, 424 U.S. at 28 (emphasis added).

For similar reasons, section 9012(f) cannot be upheld as a prophylactic measure designed to prevent circumvention of the ban upon direct contributions to candidates through covert coordination between candidates and independent groups. The constitutionality of the prohibition upon direct contributions was upheld in *Republican National Committee* v. *Federal Election Commission*, supra, only because independent expenditures provided an alternative mode of expression for a candidate's supporters. 487 F. Supp. at 286. *See also Buckley* v. *Valeo*, supra, 424 U.S. at 57 n.65 (upholding public financing on the basis of requirement of candidate's assent). The prohibition upon direct contributions cannot now be relied upon as the basis for eliminating the very independent expenditures that provide the outlet for speech and associational activities necessary to the constitutionality of the ban on direct contributions.

2. The Purposes of Public Financing.

Section 9012(f) cannot be upheld as necessary to fulfill the goals of public financing. The Fund Act's public financing provisions are intended to accomplish two objectives:

> "[1] to give candidates the opportunity to lessen the 'great drain on [their] time and energies' required by fund-raising 'at the expense of providing competitive debate of the issues for the electorate' and [2] to 'eliminate reliance on large private contributions' and on the implicit obligations to private contributors that may arise from such reliance . . . ." *Republican National Committee* v. *Federal Election Commission*, supra, 487 F. Supp. at 284, *quoting* S. Rep. No. 689, 93d Cong., 2d Sess. 5-6 (1974).

Neither objective can sustain section 9012(f).

Section 9012(f) is entirely unnecessary to accomplish the purpose of relieving candidates of the rigors and diversions of fund-raising. The public financing provision will achieve this objective, at least for the presidential candidates of the two major parties, by providing each of them with more than $40 million for the 1984 campaign. The grant of these funds alone will make it unnecessary—and, indeed, unlawful—for the candidates to attempt to raise additional contributions to support their campaigns. Both the Fund Act and the Campaign Act limit the candidate's campaign expenditures to the amount he receives through public financing. *See* 26 U.S.C. § 9012(a); 2 U.S.C. § 441a(b). These provisions, which carry criminal sanctions, render section 9012(f) superfluous to the Fund Act's purpose of relieving candidates from the burdens of fund-raising.

Section 9012(f) is not necessary to achieve the other purpose of the public financing provisions—elimination of the candidate's reliance on large private contributors. The provision of more than $40 million in public funds frees the candidate from that dependence. Moreover, as the Court noted in *Buckley*, the "interest in alleviating the corrupting influence of large contributions is served" directly by the Campaign Act's "contribution limitations and disclosure provisions . . . ." 424 U.S. at 55 (emphasis added).

Thus, while section 9012(f) was enacted as part of an overall system of public financing of presidential elections, it is not essential to achieve the purposes of the Fund Act.

3. Equalization of Campaign Expenditures.

Appellants assert that section 9012(f) is necessary in order to avoid the possibility that public financing will become a subsidy to, rather than a substitute for, privately-financed presidential campaigns. FEC Br. at 12-13; Democratic Party Br. at 10; Common Cause Br. at 32. Appellants' complaint is that, as a result of independent group political expenditures, there could be some inequality in the resources devoted to the campaigns of the presidential candidates in a given year. This Court, however, repeatedly has rejected as constitutionally infirm the purported governmental interest in equalizing political spending by candidates and their supporters. As the Court first stated in *Buckley* and later reaffirmed in *Citizens Against Rent Control*:

> "'[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure "the widest possible dissemination of information from diverse and antagonistic sources,"' and '"to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."' *New York Times Co. v. Sullivan*, [376 U.S.], at 266, 269, *quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S., at 484. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. *Cf. Eastern R. Conf. v. Noerr Motors*, 365 U.S. 127, 139 (1961)." *Citizens Against Rent Control v. Berkeley*, *supra*, 454 U.S. at 295-96, *quoting Buckley v. Valeo*, *supra*, 424 U.S. at 48-49.

The First Amendment simply does not permit Congress to pursue hypothetical equilibrium in the national political debate by gagging persons who are more willing or able to communicate their reasons for supporting or opposing a candidate.

Section 9012(f), in any event, does not serve to equalize the funds expended in support of presidential candidates since it (1) applies only to candidates who elect to receive public funding, (2) permits unlimited expenditure by individuals, (3) permits unlimited sums to be expended during the primary campaigns, and (4) permits unlimited sums to be spent by corporations, labor unions, and membership organizations on internal communications and by the institutional press. It restricts only groups of people who have chosen to exercise their right of association in order to advocate their political views collectively during the final months of the presidential campaign. There is no compelling justification for such a selective restraint on the exercise of First Amendment freedoms. Indeed, section 9012(f) would foster inequality by permitting the rich to engage in unlimited political expression while barring average citizens from meaningful participation in the presidential campaign through independent group advocacy.[16]

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[16] Appellants seize upon the district court's use of the term "overbreadth" to challenge its conclusion that the statute is unconstitutional. FEC Br. at 29-30; Democratic Party Br. at 36; Common Cause Br. at 43-49. However, as this Court recently noted, overbreadth need not refer to the assertion by a litigant of the constitutional rights of third parties. "[o]verbreadth has also been used to describe a challenge to a statute that in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State v. Joseph H. Munson Co.*, ____ U.S. ____, 52 U.S.L.W. 4875, 4880 n.13 (U.S. June 26, 1984). It is in this latter sense that section 9012(f) is overbroad. In any event, since the district court specifically found the statute unconstitutional as applied to appellees, arguments concerning appellees' supposed reliance on the rights of third parties are irrelevant.

CONCLUSION

For the reasons stated, the judgment of the district court declaring 26 U.S.C. § 9012(f) unconstitutional should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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Nos. 83-1032 and 83-1122

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

DEMOCRATIC PARTY OF THE UNITED STATES, ET AL., APPELLANTS,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1032

FEDERAL ELECTION COMMISSION, APPELLANT,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

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DEMOCRATIC PARTY OF THE UNITED STATES, ET AL., APPELLANTS,

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NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR APPELLANT FEDERAL ELECTION COMMISSION

I. APPELLEES' EXPENDITURES ARE SUBJECT TO THE $1000 LIMITATION OF 26 U.S.C. § 9012(f).

There can be no serious question that section 9012 (f), by its terms, applies to the millions of dollars in expenditures that appellees made during the 1980

presidential general election, and to the even greater expenditures they have stated that they would make during the 1984 presidential general election. Two three-judge district courts, in this case (FEC App. 40a-41a) and in *Common Cause* v. *Schmitt*, 512 F. Supp. 489, 492-93 (D.D.C. 1980), *aff'd by an equally divided Court*, 455 U.S. 129 (1982), have so held, without a single dissent. The Commission, whose interpretation of the statute is entitled to substantial deference,[1] has explicitly interpreted section 9012(f) to apply to appellees' activities. *See* AO 1983-10, 1983-11, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5715, 5716; 11 C.F.R. § 9012.6(a). Even appellees have conceded up to this point that section 9012(f) explicitly applies to their activities.[2]

[1] *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 34 (1981).

[2] Appellees' concession of this issue began with their original pleadings below and continued even in their Motion to Affirm or Dismiss in this Court. First, they admitted in their Answer that, as alleged in ¶¶ 9, 10 of the Commission's Complaint (J.A. 16), they would make expenditures " 'which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates in an aggregate amount exceeding $1,000.' " *See also* ¶ 4 of the Democratic Party's Amended Complaint (J.A. 19-20), admitted in relevant part by appellees. Next, in briefs to the three-judge court below, appellees discussed the section's legislative history and concluded: "[t]he point is not that section 9012(f) does not by its terms limit what defendants here propose to do. It does. . . ." Brief on the Merits filed October 17, 1983, p. 13 (Nos. 83-2329 and 2823, E.D. Pa.). Finally, appellees' Motion to Affirm or Dismiss, filed in this Court March 23, 1984, acknowledged that section 9012(f) applies to their expenditures. Motion to Affirm or Dismiss at 3, 4.

Amicus National Congressional Club (hereafter "amicus NCC") also represented to this Court in its earlier amicus brief in support of appellees' Motion to Affirm or Dismiss that "there is no doubt that Congress intended § 9012(f) to limit independent expenditures by all political committees not authorized by a candidate; any narrowing construction would do violence to the plain meaning of the provision and replace it with a judicially fashioned compromise that Congress never intended." Brief of amicus NCC Supporting Summary Affirmance 16-17 (filed March 23, 1984). It thus appears that "in this Court" NCPAC and amicus NCC have "changed positions as nimbly as if dancing a quadrille." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 540 (1978), *quoting Orloff* v. *Willoughby*, 345 U.S. 83, 87 (1953).

Nevertheless, even though they have never before suggested that there was any basis for a judicial narrowing of section 9012(f) that would avoid the constitutional questions presented,[3] appellees now argue that the legislative history of the Fund Act indicates that, despite its admittedly clear terms, section 9012(f) should be construed not to apply to appellees' expenditures. It is well settled, however, that the language of a statute controls its construction unless there is " 'clear evidence' . . . of a 'clearly expressed legislative intention to the contrary.' " *Bread Political Ac-*

[3] *See* n.2, *supra*. The court below expressly asked all counsel for ways in which the statute could be narrowed to avoid the constitutional questions (*see* FEC App. 87a); counsel for appellees responded "I don't see how you can narrow the statute" (FEC App. 91a n.61). This was no spur of the moment concession. Appellee Fund For a Conservative Majority was also an appellee in *Common Cause* v. *Schmitt*, 455 U.S. 129 (1982), but did not join the other parties in that case in arguing that section 9012(f) could be interpreted not to apply to independent expenditures. Instead, FCM conceded that section 9012(f) operates "to bar independent expenditures by unauthorized committees. . . ." Brief of Fund for a Conservative Majority in Nos. 80-847 and 80-1067, pp. 7-8.

tion Committee v. *FEC*, 455 U.S. 577, 581 (1982) (citations omitted); *North Dakota* v. *United States*, 460 U.S. 300, 312 (1983).[4] Appellees have not even attempted to satisfy this standard; to the contrary, their argument is limited to attempting to show that "congressional debate is not as clear as it might be" (Br. 18 n.23) on the scope of section 9012(f). This half-hearted, belated attempt to convince the Court that the constitutional issue grappled with by two three-judge district courts, and by this Court in 1981, is irrelevant to the resolution of this case, should be summarily rejected.

Appellees first suggest (Br. 18 n.23) that the statute could not have been intended to cover them because at the time it was enacted there were no unconnected multicandidate political committees that made expenditures as well as contributions. However, section 9012(f) explicitly applies to "*any* political committee which is not an authorized committee" (emphasis added) of a publicly funded presidential candidate, and the definition of political committee in the statute clearly covers appellees (*see* FEC Br. 32-33)—indeed, appellees have registered with the Commission as political committees and have accepted the benefits the statute provides for multicandidate committees (Stip. 4, 23, 24 at J.A. 25, 28). Section 9012(f) contains no exclusion for any type of political committee, based either on length of existence or ideological orientation, as suggested by appellees (Br. 18 n.23), or on lack of connection to a political party,

[4] The Court will not judicially rewrite a clear statutory provision even to avoid a constitutional question. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964); *Edward J. Debartolo Corp.* v. *NLRB*, 103 S.Ct. 2926, 2933 n.10 (1983).

as suggested by amicus NCC (Br. 38-39). To the contrary, as it did in regulating corporations and unions,[5] Congress in section 9012(f) enacted a prophylactic rule covering *all* political committees, including nominally independent groups, like appellees, operated by the candidate's longstanding political allies, because of their potential to operate a private supplemental campaign on the candidate's behalf.[6]

Appellees next suggest (Br. 18-23) that section 9012(f) was only intended to reach expenditures made in cooperation with the candidate. However, the Fund Act would make little sense if construed in this manner, for 26 U.S.C. § 9012(b) completely prohibits the acceptance of contributions by a publicly financed candidate, and expenditures made in cooperation with the candidate have long been considered to be contributions.[7] Thus, appellees candidly admit

[5] *See FEC* v. *National Right to Work Committee*, 459 U.S. 197, 209-10 (1982).

[6] As Senator Gore put it in opposing the first Honest Elections Act for failure to restrict expenditures by nominally independent groups:

> Under the pending proposal . . . . [u]p to $30 million would be available to each major party for certain expenses . . . . In addition, this $30 million could be augmented by whatever amounts that might be raised and spent from private contributions by individuals or organizations not under "control" of the presidential candidate . . . . Under the pending amendment, the expenditures would be outside the so-called restriction as long as the candidate had no "control" over the organization, and lack of "control" is very easy to manage.

113 Cong. Rec. 10,201 (1967).

[7] Appellee (Br. 24 n.25) and amicus NCC (Br. 41) argue that in 1967 Congress did not understand the term "contribution" to include the direct payment of the candidate's ex-

(Br. 24 n.25) that "section 9012(f) would be redundant if it is construed . . . to apply only to coordinated expenditures," a result that would violate one of the most basic rules of statutory construction. *See, e.g., Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961) ("[W]e will not adopt a strained reading [of a statute] which renders one part a mere redundancy"). *See also, Colautti* v. *Franklin*, 439 U.S. 379, 392 (1979); *FAA* v. *Robertson*, 422 U.S. 255, 261 (1975). Appellees' further contention that Congress in 1971 did not understand that the term "expenditure" used in section 9012(f) included expenditures for direct communication with the public cannot be taken seriously. Congress utilized that term in amending the Corrupt Practices Act in 1947 to reach independent advocacy by unions,[8] and it was in

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penses, which today are called "in-kind" contributions, and that the term "expenditures" in section 9012(f) must have been used to refer only to such payments. However, the payment of the candidate's own campaign expenses clearly was considered a contribution, subject to the absolute prohibition of section 9012(b), and not an expenditure, subject to the $1000 limitation of section 9012(f). The Senate Report accompanying the second Honest Elections Act of 1967 indicated, for instance, that a printing shop that printed handbills for the candidate free of charge would be considered to have made a contribution, and that volunteer activities for the candidate would be considered a contribution to the candidate unless they were done "without pay from anyone . . . ." S. Rep. No. 714, 90th Cong., 1st Sess. 13 (1967).

[8] Senator Taft explained the extension of the Corrupt Practices Act to cover "expenditures" as follows:

> [W]e have long prohibited corporations from contributing money for political purposes, and it was always supposed that the law prevented a corporation from . . . advertising in newspapers for that purpose, until labor organizations were included . . . and then it was said

1971 engaged in reaffirming the reach of that provision.[9]

To support their contention that section 9012(f) was not intended to reach independent expenditures,[10]

> that the law prohibited contributions, but that political advertisements and political pamphlets could be published by the union or corporation itself.
>
> So what we are proposing to do is to subject labor organizations to exactly the same prohibition to which corporations have been subjected, and, so far as I know, including the things which I think the original law covered but regarding which doubt was raised by labor organizations.

93 Cong. Rec. 6594 (1947), *reprinted in II NLRB, Legislative History of the Labor Management Relations Act of 1947* 1527 (GPO, 1948). *See also, United States* v. *UAW*, 352 U.S. 567, 585 (1957).

[9] The 1971 Federal Election Campaign Act included what was called the "Hansen Amendment" to former 18 U.S.C. § 610 to exempt certain corporate and union activities from that statute's ban on political expenditures. Congressman Hansen explained the reach of the prohibition of expenditures as follows:

> [T]here is broad agreement as to the essence of the proper balance in regulating corporate and union political activity required by sound policy and the Constitution. It consists of a strong prohibition on the use of corporate and union treasury funds to reach the general public in support of, or opposition to, Federal candidates and a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject . . . .

117 Cong. Rec. 43,381 (1971), *quoted in Pipefitters* v. *United States*, 407 U.S. 385, 431 (1972).

[10] Appellees admit that, in the words of the statute, their presidential election expenditures, consisting primarily of advertisements urging voters to support a particular candidate (Stip. 46-49, 63-65, 95, 97, 99-101, 108-109, 138 at J.A.

appellees rely exclusively upon some admittedly equivocal statements by Senator Pastore in 1971 opposing an amendment that would have extended the reach of section 9012(f) beyond political committees to cover every sort of group of individuals.[11] Senator Pastore opposed this amendment because of his concern that it might preclude joint action by *ad hoc* groups of individuals, spending their own money jointly to distribute a pamphlet or to pay their own personal expenses to canvass voters on election day.[12] His remarks however, were not in the context of a

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31-32, 34-35, 39-41, 46), "would constitute qualified campaign expenses if incurred by an authorized committee" of the candidate. *See* n.1, p. 2, *supra*. Any expenditures they might incur to promote the candidate before or after the "expenditure report period" specified in 26 U.S.C. § 9002(12) would fall outside this restriction. *See* AO 1983-10, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5715, p. 10,970.

[11] This amendment, proposed by Senator Taft, was one of a number of amendments offered by opponents of public financing in an attempt to make the bill unacceptable to wavering senators. Senator Taft's amendment listed, in addition to political committees, not only corporations, partnerships, unions, and political education committees that were not political committees, but also broadly covered all associations and "any other committee."

[12] As discussed in our opening brief, p. 34, the Commission has not found such *ad hoc* groups spending their own money to be political committees under the campaign financing statutes. The advisory opinions relied upon by appellees (Br. 37-38) and amicus NCC (Br. 11 n.21) clearly follow the functional distinction stated on pp. 31-32 of our opening brief. For example, AO 1980-126, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5577, concluded that a single person could be found to be operating a political committee when he held himself out as a political committee and solicited contributions for political use. Similarly, in AO 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5427, the Commission concluded that a political discussion group had converted itself into a political committee when it began to gather contributions for candidates, and looked behind the assertion that the collection of contributions was incidental to the committee's central purpose. Moreover, even appellees and amicus NCC have been unable to point to a single instance in the nine year history of the Commission in which it has attempted to enforce the statutes' provisions regulating political committees against any such group of individuals jointly expending their own money. Of course, the mere speculation that the Commission might make such a ruling in the future is no basis for finding section 9012(f) unconstitutional, for the Commission can impose no sanctions without the concurrence of a federal court. The courts have already indicated that they will not passively enforce the Commission's view as to the reach of the definition of political committee. *See FEC* v. *Machinists Non-partisan Political League*, 655 F.2d 380, 390-96 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981); *FEC* v. *Florida For Kennedy Committee*, 681 F.2d 1281, 1286-88 (11th Cir. 1982) (both holding that committees formed to draft an individual as a party's presidential nominee are not political committees).

debate over the type of expenditures to be restricted by section 9012(f), but were rather directed against extending the statute's reach beyond political committees.[13]

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[13] As appellees concede, there was some confusion in the debate over the Taft amendment. Senator Taft himself admitted that a part of his amendment might be redundant, 117 Cong. Rec. 42,398 (1971), and Senator Pastore stated he was not sure whether COPE would be considered a political committee under the Act, opining that "it is close to the line," and finally admitting that he did "not have the perfect answer." 117 Cong. Rec. 42,401 (1971).

Senator Pastore's uncertainty about section 9012(f) apparently stemmed from the fact that he had nothing to do with the drafting of that provision. He was a sponsor and the floor manager of the bill in 1971, apparently because he was chairman of the Commerce Committee's subcommittee on communication, which had reported the Federal Election Campaign Act of 1971, with its amendments to the Communications Act. *See* S. Rep. No. 96, 92d Cong., 1st Sess. (1971). Senator

In any event, this isolated bit of 1971 legislative history relied upon by appellees is woefully inadequate to rebut the extensive showing in our opening brief, pp. 15-23, that section 9012(f) was proposed and adopted precisely to protect the integrity of the public financing scheme from being undermined by private election campaigns organized by nominally independent groups to supplement the campaign of a publicly financed presidential candidate.

Congress clearly focused on the issue of expenditures by independent groups as part of a broad debate on public financing between those who, led by Senator Long, sought only to provide a subsidy for the major parties—approximately $30 million under the Long Plan—and those led by Senator Gore who argued for comprehensive control of private campaign financing. Senator Gore listed nine separate objections to the 1966 Act, covering both constitutional and policy concerns, with the failure to limit expenditures by independent groups being the sec-

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Pastore had not been a member of the Senate Finance Committee which had originated the wording of section 9012(f)(1) section 310(f) of the second Honest Elections Act of 1967 (see n.18 *infra*), and he acknowledged that he had simply adopted the language which had been proposed at that time. 117 Cong. Rec. 42,626 (1971). Accordingly, Senator Pastore's equivocal remarks in opposition to the unsuccessful Taft amendment cannot be given substantial weight in construing the statutory language that was adopted. *See Chandler* v. *Roudebush*, 425 U.S. 840, 859 n.36 (1976) (Court declined to defer to a statement of bill's floor manager where he was not the author of the disputed provision); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118-19 (1980) (little weight given to statement of bill's sponsor who "was not a sponsor of the original bill that ultimately provided that legislation with" the provision at issue).

ond of the nine points. 113 Cong. Rec. 10,200-202 (1967). He saw the legislature's failure to control private expenditures as one of the important defects of an approach which had only subsidy of the major parties as its goal."[14] Senator Gore argued that contribution limitations by themselves would be insufficient, 113 Cong. Rec. 10,201 (1967), and spoke explicitly of the ease with which committees could be arranged to be technically independent. *See* n.6, p. 5, *supra*. Indeed, a central point in the debate was Senator Gore's insistence that it was necessary to find ways to ensure that public financing was an alternative to a system of uncontrolled, unaccountable private campaign financing. *See, e.g.*, 113 Cong. Rec. 10,201, 10,306, 11,481 (1967).

In short, the very point of the debate over the Long Plan was to consider the impact public financing would have on the existing system of private funding. The successful opposition did not argue for repeal on the basis of a single objection, but because of a series of effects of public financing which had not been focused upon when the original Long Plan was passed. The theme of these objections was that subsidizing election campaigns without controlling and limiting private money was fundamentally unsound—because it would shut off access to the presidential system by third parties; because an unconditional $30 million subsidy of the national party committees could substantially alter the structure of the political parties; because it provided no system

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[14] Gore had listed the same points in 1966 when he then sought to block the Long Plan, by tabling the conference report on the Foreign Investors Tax Act (of which the Long Plan was a part). 112 Cong. Rec. 28,063-064 (1966).

of accountability for the public funds adequate to ensure that they would be used only for campaign expenses; and because it did nothing to limit the use of private money, through contributions or expenditures, by party committees or by totally unauthorized committees. *See, e.g.*, 113 Cong. Rec. 8,060-063, 8,295, 8,304, 9,396, 11,485 (1967) (remarks of Sens. Gore and Spong).[15]

This debate resulted in recommitting the matter to committee for hearings to explore the range of problems which had been raised by the opponents of the Long Plan. In addition to Senator Long's proposal, which he had amended, as promised during the floor debate, 113 Cong. Rec. 8,309-312 (1967), to take account of many of the opponents' criticisms, those hearings focused on several different bills—most

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[15] The latter part of the parliamentary battle is set forth in full at FEC Br. 19 n.11. On April 13, 1967, the Senate accepted 48-42, an amendment proposed by Senators Gore and Williams to repeal the 1966 Act. 113 Cong. Rec. 9397 (1967). On April 20, 1967, the Senate voted 46-42 to accept Senator Long's first Honest Elections Act as an amendment to an investment tax credit bill. Majority Leader Mansfield then submitted a motion to recommit the investment tax credit bill to committee with all floor amendments deleted. This motion was adopted on April 25, by 64-22, 113 Cong. Rec. 10,692 (1967), with an intervening statement by Senator Long, who originally had agreed to support the motion to recommit, that he had misunderstood his majority leader. 113 Cong. Rec. 10,314 (1967). Senator Long's motion to strike the repeal section failed, as did another Gore-Williams substitute to repeal, which failed 48-48. 113 Cong. Rec. 12,166 (1967). Only subsequent to those deadlocks, on May 9, 1967, did the Mansfield amendment, to prohibit appropriations and disbursements under the 1966 Act, succeed in blocking implementation of that Act. 113 Cong. Rec. 12,169 (1967).

prominently an Administration bill and one submitted by Senator Gore.[16]

These hearings conducted by the Senate Finance Committee carefully explored, *inter alia*, the wisdom and constitutionality of limiting expenditures by independent groups. Senator Long and a number of the witnesses supporting the administration bill thought that prohibiting expenditures by such groups would unnecessarily raise constitutional questions, while Senator Gore argued that, while such expenditures should not be prohibited, they could and should be limited.[17]

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[16] As amicus NCC concedes (Br. 40 n.50), most of the witnesses before the committee testified in support of the administration bill, which would not have regulated expenditures at all.

[17] The CHAIRMAN [Senator Long] . . . No matter how pure we try to make a candidate's election, . . . there is still no way that we could keep his friends from proceeding to organize and raise large amounts of money and spend it in ways that they thought would help advance his candidacy.

Mr. BARR. Senator, we would have to amend the Constitution to stop them from spending the money. We could regulate it; Senator Gore has a means of regulating them——

Senator GORE. And limit.

Mr. BARR. Regulating and limiting. I will defer to the Attorney General on the limitation, Senator Gore . . . .

* * * * *

Senator GORE. . . . [I]f you regulate and limit the expenditures of a committee that has not been authorized to campaign in behalf of a candidate—which I suggest may well be done under our Constitution—and if you require an unauthorized committee engaging in political activity to disclose and as a part of that disclosure make

The second Honest Elections Act of 1967, containing for the first time the limitation on expenditures now appearing at 26 U.S.C. § 9012(f)(1),[18] was reported by the Senate Finance Committee as a result of these hearings, and it is plain that this lengthy debate during the hearings was resolved in favor of Senator Gore's position that expenditures by independent political committees should be limited. The Congress that finally enacted the provision in 1971 was also well aware that this was its effect; it was explicitly stated by senators on both sides of the aisle during the 1971 debate. *See, e.g.*, 117 Cong. Rec. 41,777 (1971) (remarks of Senator Kennedy) ("unauthorized committees supporting candidates who elect public financing are limited to expenditures of $1,000"; "by allowing unauthorized committees to spend up to $1,000 for their candidate,

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> it known that committee has not been authorized by the candidate to solicit in his behalf, or to campaign in his behalf—it seems to me that you impose a very practical limit, one that can be easily enforced. And let me repeat, we are not in any way seeking to be absolute, 100 percent, in all this area.
>
> But instead of running from these problems, it seems to me that we should seek answers, seek solutions—instead of throwing up our hands at the complexity.

Political Campaign Financing Proposals: Hearings on Various Proposals for Financing Before the Senate Committee on Finance, 90th Cong., 1st Sess. 136-140 (1967).

[18] The political committee expenditures limitation now contained in section 9012(f)(1) first appeared in § 201 of H.R. 4890 as reported by the Senate Finance Committee (*see* FEC Br. 20). Section 201 of H.R. 4890 would have amended the 1966 Act to add a title III, § 310(f) of which would have included the limitation on expenditures by political committees.

the amendment avoids the first amendment objections that might be raised against any complete prohibition of private spending"); 117 Cong. Rec. 42,592 (1971) (remarks of Senator Dole) ("the unauthorized committees could also solicit funds and use them for any purpose, provided they did not spend more than $1,000 to elect a President or Vice President").

The culmination of these proceedings was a compromise that included a system of limitations for the candidate who would receive and be responsible for the public money, as well as for the various types of political committees—party, authorized or unauthorized—which supported him. This hard won compromise, and the discussions that produced it, cannot be reconciled with appellees' picture of a Congress blithely unaware of the likelihood that expenditures which were not in the direct control of the candidates or their parties would occur and become highly influential. For the very issue that occupied so much of the long debates on the Senate floor and in committee hearings was how far Congress could and should go to assure that public financing would supersede private financing, and thereby free the candidate from concern about private funds, while at the same time permitting a full range of individual and group expression.[19]

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[19] Indeed, the constitutional concerns throughout were directed primarily to the possibility of limiting expenditures by independent private groups; no one doubted the constitutionality of limiting expenditures by those working in privity with the publicly financed candidate. *See, e.g., Political Campaign Financing Proposals: Hearings on Various Proposals for Financing Before the Senate Committee on Finance*, 90th Cong., 1st Sess. 93 (exchange between Mr. Barr and Senator

Congress did not narrowly debate whether committees not formally authorized by the candidate, but connected to him, would be limited in expenditures, or whether expenditures, if coordinated, would be called contributions. It debated, with a sharp sense of the realities and the history of campaign financing practices, how to limit the role of private money in campaigns financed with public funds.[20]

In sum, the two three-judge district courts were correct in concluding that the plain terms of section 9012 (f) demonstrate Congress' intent to reach precisely those expenditures made by unauthorized political committees, independent of the candidate, which "*would* constitute qualified campaign expenses" if they had been incurred (authorized or requested) by the candidate or agents of the candidate. Appellees' argument that section 9012(f) reaches only expendi-

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Long), 152-153 (remarks of Elmer Staats, Comptroller General), 398 (exchange between Senator Williams and Assistant Attorney General Fred M. Vinson, Jr.) (1967).

[20] In many ways, the 1971 debate over the one major change that was made in the reintroduced Honest Elections Act reflects most clearly the congressional sense of the reality of campaign finances. For it was in the debate over the issue of whether the subsidy, even with the attendant limitations on contributions and expenditures, did not unfairly disadvantage third and minor parties from any realistic chance of success in presidential elections, that Congress focused on the different problems in raising money for groups with little chance of electoral success as opposed to those for candidates of the two major parties. That change resulted in a significantly increased opportunity for third parties to participate in the public funding system, which appears to have been critical in this Court's conclusion that the statute did not unconstitutionally disadvantage groups with relatively little political strength. (*See* FEC Br. 12.)

tures *actually* authorized by the candidate contradicts the express language of the statute itself and would undermine the clear purpose of section 9012(f)—to ensure that public funding will be a substitute for private campaign financing and not a mere supplement to it.[21]

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[21] Appellees (Br. 23 n.25) and amicus NCC (Br. 5) argue that the Commission did not always interpret section 9012(f) to cover independent expenditures. They have found no official determination of the agency purporting to limit the scope of section 9012(f); instead they point to oral statements of individual Commissioners and an informational letter sent by an employee of the Commission. Even these statements merely expressed understandable constitutional concerns in the wake of this Court's then recent decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), rather than purporting to construe the legislative history and purpose of the provision. Even if they had been official determinations, such constitutional expressions would carry little if any weight. *See, e.g., Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Johnson* v. *Robison*, 415 U.S. 361, 368 (1974). Moreover, the Federal Election Campaign Act expressly precludes the Commission and its employees from issuing any official advice as to the meaning of the campaign financing statutes except through the formal advisory opinion procedures established in that act. 2 U.S.C. § 437f(b). And the Commission's failure to promulgate a regulation merely reiterating the words of section 9012(f) is of little significance. *See Planned Parenthood* v. *Schweiker*, 700 F.2d 710, 726 (D.C. Cir. 1983) ("[W]e see little reason for the agency to promulgate a rule declaring it will do what it is statutorily bound to do"). The Commission's formal opinions expressly addressing section 9012(f) are those to which this Court owes deference, rather than earlier informal statements by individuals at the Commission. *Miller* v. *Youakim*, 440 U.S. 125, 144-45 n.25 (1979).

II. SECTION 9012(f) DOES NOT ABRIDGE APPELLEES' FIRST AMENDMENT RIGHTS.

Appellees' constitutional claims are grounded upon their insistence (Br. 25) that this Court's opinion in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) can be boiled down to a simple *per se* rule that "[l]imitations on contributions were constitutionally sanctioned; similar limitations on expenditures were not." Of course, as we have shown in our opening brief, pp. 9, 37-39, the analysis in *Buckley* was far more sophisticated than this, carefully scrutinizing the particular purposes and effects of each statutory provision under the applicable constitutional standards, and upholding some limits on contributions and expenditures while striking down others. Indeed, the very fact that this Court has continued since *Buckley* to scrutinize individually each limitation on political expenditures to come before it[20] demonstrates that the constitutional analysis cannot be reduced to a *per se* rule that expenditures can never lead to the appearance of corruption in the electoral process.

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[20] *Compare, e.g., First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978) (striking down statute limiting corporate expenditures on ballot referenda); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981) (striking down contribution limitation on ballot referenda) *with FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982) (upholding prohibition of corporate and union contributions and expenditures in federal candidate elections); *California Medical Assn.* v. *FEC*, 453 U.S. 182 (1981) (upholding limitation on contributions to political comittees in federal candidate elections).

Appellees err in suggesting (Br. 34, n.22) that this Court did not uphold the constitutionality of the prohibition of expenditures by corporations and unions in *FEC* v. *National Right to Work Committee*. Although that case directly concerned the construction of a subsection of 2 U.S.C. § 441b limiting corporate solicitations of political contributions, the Court discussed at length the purposes behind the general prohibition of contributions and expenditures in that provision, and concluded that "the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b." 459 U.S. at 207. Furthermore, the implication that a restriction of solicitation of political contributions is somehow subject to less exacting scrutiny under the First Amendment than other expenditures for political expression is contrary to this Court's consistent view. *See, e.g., Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 104 S.Ct. 2839, 2849 (1984); *Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). The *en banc* Eleventh Circuit has unanimously concluded that this Court's decision in *National Right to Work Committee* did uphold the constitutionality of the prohibition of corporate expenditures. *Athens Lumber Company* v. *FEC*, 718 F.2d 363 (11th Cir. 1983) (*en banc*) (answering in the negative constitutional questions set forth at 680 F.2d 1006, 1015-16), *appeal dismissed, cert. denied*, 104 S. Ct. 1580 (1984).

Appellees posit that Congress was obligated and failed to prove that expenditures have been made in return for explicit favors. Failing such proof, they argue, Congress could not permissibly conclude that it needed to protect public financing against the potential of political committees to mount supplemental privately funded campaigns. They argue that the decision in *Buckley* determined it is beyond congressional power to conclude that unlimited expenditures by political committees could or would rise to levels that would induce or require candidates

to woo those with the power to aid their candidacies and create precisely the sort of political debts that the Fund Act was intended to eliminate.

Buckley v. *Valeo* stands for no such proposition, nor do the words of this Court in explicating the constitutional balance suggest any such attempt so to limit the legislative branch. This Court did, of course, conclude that the broad limitation of all expenditures by individuals, groups, or political committees in support of privately financed candidates did not survive the strict scrutiny required by the First Amendment. But by the very conclusion that expenditure limitations required a stricter scrutiny than contribution limitations in order to be upheld, this Court rejected the fundamental argument that appellees make: that expenditures *inherently* lack the capacity to threaten the electoral system on which the succession of the executive power depends. Rather, this Court expressed a willingness to consider assertions upon a different record that independent expenditures would have such capacity. *Buckley* v. *Valeo*, 424 U.S. at 46; *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 788 n.26 (acknowledging the possibility that limitation of some kinds of independent expenditures in candidate elections could be shown to be constitutionally justified). *See also Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. at 299, n.6, 301-02 (Marshall, J., *concurring*), 302-03 (Blackmun, J., and O'Connor, J., *concurring*); *FEC* v. *National Right to Work Committee*, 459 U.S. at 210 n.7; *FCC* v. *League of Women Voters of California*, 104 S.Ct. 3106, 3113 n.9 (1984).[20]

[20] There is no evidence in the legislative history to support amicus NCC's assertion (Br. 33-34) that section 608(e) of the 1974 amendments to the Federal Election Campaign Act, which was found unconstitutional in *Buckley* v. *Valeo*, 424 U.S. at 45-51, was merely a broadened version of section 9012(f) of the Fund Act, intended to serve the same functions. Congress did not repeal section 9012(f), and as we have shown (FEC Br. 35-39), section 9012(f) was a narrower provision designed to play a special role in the public financing system that was unrelated to the motivations behind enactment of section 608(e) by Congress three years later. Thus, the fate of section 608(e) does not foreclose upholding section 9012(f) any more than the Court's striking down of the FECA's limitation on campaign expenditures by all federal candidates, 424 U.S. at 57-58, deterred the Court from upholding an identical limitation on expenditures by publicly funded candidates contained in the Fund Act, 424 U.S. at 108-109.

Since *Buckley* v. *Valeo* did not establish a *per se* rule that Congress can never control political expenditures, the issue before the Court is whether 26 U.S.C. § 9012(f) comports with the requirements of the Constitution. We have shown in our opening brief, pp. 15-23, 30-32, that section 9012(f) was narrowly tailored to protect the integrity of the public financing scheme against the special potential of political committees to mount supplemental private campaigns, which Congress believed could create exactly the sort of political debts on the part of the candidate that the Fund Act was intended to eliminate.[21] These per-

[21] Amicus NCC suggests (Br. 33 n.37) that the Court cannot uphold section 9012(f) except upon a showing that Congress had before it in 1971 evidence that an appearance of corruption had actually arisen at that time from political committees' independent campaigns to supplement publicly financed candidates. This Court has never so restricted Congress' ability to fashion legislation; indeed, this argument is nothing more than an assertion that Congress cannot legislate to forestall opportunities for corruption until after the government has been corrupted. The suggestion that the members of Congress, all of whom are successful politicians personally acquainted with the realities of the world of campaign financ-

manent, well organized political committees have displayed their ability to amass large campaign coffers to spend on presidential elections. The level of spending for the full range of campaign activities, mass mailings, and national media ads directly promoting one candidate during the 1980 election demonstrates the ability of these committees to exert a significant influence on the electoral process—an influence that no presidential candidate can afford to ignore. Indeed, expenditures by such committees might well come to exceed the total allotment for a publicly funded candidate, with the result that the candidate's own publicly funded campaign would become increasingly subordinated to, and obscured by, the campaign activities of unaccountable political committees.[26]

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ing, could not have anticipated the response of the private campaign finance system to the advent of public financing is belied by the facts in the record of this case which demonstrate that Congress' expectations have been entirely borne out by the activities of political committees like appellees. In fact, as noted *supra*, pp. 6-7, Congress had already seen how the longstanding prohibition of corporate and union contributions to federal candidates had generated independent expenditure campaigns which had to be dealt with later. Finally, not only has this Court not required that federal legislation be supported by a factual record that is contemporaneous with its enactment, the Court has not even required that the purposes upon which the statute is defended be identified contemporaneously with its passage. *See Bolger* v. *Youngs Drug Products Corp.*, 103 S.Ct. 2875, 2882-83 (1983).

[26] John T. Dolan, chairman of appellee NCPAC, is reported to have acknowledged this problem:

> [G]roups like ours are potentially dangerous to the political process. We could be a menace, yes. Ten independent expenditure groups, for example, could amass this great amount of money and defeat the point of accountability in politics. (Stip. 68 at J.A. 35).

Appellees also urge that, whatever the purposes section 9012(f) serves, it is unconstitutional because it infringes the rights of their contributors to pool their resources to engage in political speech. However, as shown in our opening brief, pp. 33, 39, the record in this case demonstrates that appellees use the money obtained from contributors to fund the speech of the handful of political professionals who run them, not the speech of the people who contribute to them.[26] Thus, these political committees are in no way similar to an individual or a group of individuals who spend their own funds to express their own support for a candidate, but instead are multicandidate committees which regularly contribute large amounts of money directly to a broad range of federal, state, and local candidates.[27] They are ongoing

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[26] Appellees argue (Br. 12) that contributors must be fully aware of, and in agreement with, the manner in which their money is spent because "[t]heir *mailings* are direct and to the point." (emphasis added). Evidence of such agreement supposedly lies in "[t]he sheer number of contributors who have responded over the years to explicit *fundraising solicitations*. . . ." *Id.* (emphasis added). Accordingly, appellees claim they "live by the highest form of accountability," *i.e.* the continuing need for funds. Obviously, a contributor responding to a solicitation thereby shows some measure of agreement with that solicitation's message. It would therefore be more accurate to say that committees like appellees are accountable in the content and design of their *solicitations*. However, no such accountability accompanies the manner in which the money is spent to advocate a candidate, or whether the funds are spent in direct campaign activities at all. (*See* FEC Br. 39.)

[27] Appellees argue (Br. 35) that it is precisely the omission of individuals from 9012(f)'s coverage that renders the sec-

entities managed by sophisticated political professionals, whose contributors have no voice either in the policies or operation of the committees, or in determining how, where, when and for whom money will be spent. Accordingly, application of section 9012(f) to appellees affects only "speech by proxy," *California Medical Association* v. *FEC*, 453 U.S. at 196, and does not infringe the direct political speech of either appellees' managers or their contributors.

CONCLUSION

For the foregoing reasons, and the reasons stated in our opening brief, the Court should reverse the judgment of the United States District Court for the Eastern District of Pennsylvania and hold that 26 U.S.C. § 9012(f) does not violate the First Amendment to the Constitution of the United States. For the reasons stated in our opening brief, which have not been contested by any other party before the Court, the Court should also reverse the lower court's jurisdictional decision and hold that 26 U.S.C. § 9011(b)

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tion ineffective. As noted earlier (FEC Br. 10), this choice involves a sensitive balancing of interests, and Congress' judgment that political committees pose a greater threat to public financing than individuals, especially in view of the countervailing First Amendment interests presented, is confirmed by the record in this case, and not rebutted by the statistics cited at J.A. 52. Such a judgment on the varying risks of different entities is well within Congress' area of expertise and entitled to substantial deference. *See FEC* v. *National Right to Work Committee*, 459 U.S. at 210-11; *California Medical Association* v. *FEC*, 453 U.S. at 201.

does not afford a private right of action to enforce the Fund Act.

Respectfully submitted,

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REPLY

BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

FEDERAL ELECTION COMMISSION,
Appellant,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,
Appellees.

DEMOCRATIC PARTY OF THE UNITED STATES *et al.*,
Appellants,

v.

NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE, *et al.*,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

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STATEMENT PURSUANT TO RULE 28.1

This Reply Brief is filed on behalf of the Democratic Party of the United States and the Democratic National Committee. Neither is a corporation.

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INTRODUCTION

The Federal Election Commission ("FEC") urges this Court to rule that the Democratic National Committee ("DNC") had no right to initiate this litigation pursuant to 26 U.S.C. §9011(b).[1] The FEC, while recognizing that 9011(b) "plainly authorizes" the DNC to "invoke its provisions",[2] nevertheless argues that the DNC should not have been permitted to bring this case, apparently because the FEC believes it has "exclusive" authority to "enforce" the Presidential Election Campaign Fund Act of 1971 ("Fund Act").

This Court should reject the FEC's arguments for at least three reasons. First, it is unnecessary for this Court to reach the standing issue since the FEC, a co-appellant, clearly has standing to bring the case on the merits before this Court. Second, the instant case is not an injunctive action seeking enforcement, but rather a declaratory judgment action seeking a ruling on the constitutionality of a statutory provision, an area in which the Congress did not grant the FEC any special status. Finally, even if injunctive relief had been sought, section 9011(b) authorizes the DNC to bring this action.

ARGUMENT

I. This Court Need Not Decide Whether The Democratic National Committee Had Standing To Bring This Action.

As the FEC points out in its brief,[3] there is no need

1. 26 U.S.C. §9011(b)(1) states:

"The [FEC], the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe [sic] any provisions of this chapter."

2. *FEC Brief* at 41.

3. *FEC Brief* at 49-50, n. 36.

for this Court to resolve the issue of whether section 9011(b) conferred standing on the DNC to initiate this action. This is the case because there is no question about the right of the co-appellant, the FEC, to bring this action. Therefore, this Court should decline to rule on the standing issue raised by the FEC.[4]

II. Section 9011(b) Clearly Authorizes the DNC To Bring A Non-Enforcement, Declaratory Judgment Action Seeking A Ruling On The Constitutionality of Section 9012(f).

In the case before this Court, the DNC seeks nothing other than a declaratory judgment with respect to the constitutionality of section 9012(f). It seeks no injunctive relief and no enforcement remedy. The FEC conceded below that "a suit seeking only [a] declaratory judgment of the construction and constitutionality of 26 U.S.C. §9012(f)(1) . . . does not seek enforcement of the Act."[5]

4. The FEC urges this Court to rule on the standing issue because it claims it fears a multitude of lawsuits and thus "the potential for partisan abuse of the campaign financing laws. . . ." *FEC Brief* at 50 n. 36. This Court specifically rejected a similar argument raised by the FEC in 1981 regarding the Federal Election Campaign Act ("FECA"). In *California Medical Association v. FEC*, 453 U.S. 182, 193 n.13 (1981), this Court stated:

> To date, there have been only a handful of cases certified to the Courts of Appeals under this procedure. (Citations omitted). Moreover, the Federal Election Campaign Act is not an unlimited fountain of constitutional questions, and it is thus reasonable to assume that resort to §437h will decrease in the future. Under these circumstances, we do not believe that §437h poses any significant threat to the effective functioning of the federal courts.

(Emphasis added.)

Similarly, since its enactment 13 years ago, there have only been a handful of cases under the Fund Act.

5. FEC's Motion to Dismiss at p. 6.

Thus, it should be clear that what the FEC is claiming here is that in actions having nothing to do with enforcement, i.e. in declaratory actions dealing solely with the issue of the constitutionality of a statutory provision, the DNC has no right under section 9011(b) to institute suit. The FEC's position is wrong because the plain language of the statute authorizes such actions and because the legislative history and the statutory scheme support that plain language.

A. The Plain Language of 9011(b) Controls.

In *Caminetti v. United States*, 242 U.S. 470, 490 (1917), this Court made clear that:

> "when words are free from doubt they must be taken as the final expression of legislative intent. . . . In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

See also Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110, *reh. den.* 461 U.S. 911 (1983) (if the language is unambiguous, ordinarily it is to be regarded as conclusive).

Thus, it should be beyond doubt that the plain language of section 9011(b) controls in this case. 26 U.S.C. §9011(b) states:

> "The [FEC], the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe [sic] any provisions of this chapter."

It is difficult to imagine how the Congress could have stated its intention to permit a suit by the DNC, such as the instant one, in any clearer terms. However, the FEC

argues that this straightforward language should be rewritten to place the FEC in a special, exclusive position.

The FEC maintains that only the FEC may bring actions against private parties even in suits involving nothing other than a declaratory judgment as to the constitutionality of a statutory provision. Had the Congress intended the FEC to have such special power and status, it could have easily said so. In fact, it said just the opposite. The plain language of section 9011(b) places the FEC and the other appellants in this case on precisely the same footing. This may annoy the FEC, it may intrude upon what the FEC views as its bureaucratic "turf",[6] but it is what Congress intended.

B. The FEC Offers No Authority For Its Claim Of A Special Status With Respect To Matters of Constitutional Interpretation.

The FEC argues that the overall statutory scheme of the election laws should prohibit the DNC from bringing this action. However, they offer absolutely no authority for the proposition that the FEC is entitled under the statutory scheme to a special status when issues of constitutional interpretation are present. All the authority cited by the FEC concerns the role the FEC should play in helping to determine whether a violation or infraction of a statutory provision has occurred. None of it stands for the proposition that the FEC should be the arbiter of the constitutionality of the Fund Act.

As the FEC is well aware, the adjudication of the constitutionality of congressional enactments is beyond the jurisdiction and expertise of administrative agencies. *See e.g., Oestereich v. Selective Service Bd.*, 393 U.S. 233,

6. Even the appellees appear to recognize this aspect of the FEC's position on this issue. They state in their brief that "it now appears that the FEC's arguments against the Democratic right of action at this stage of the proceedings . . . is essentially a "turf fight" in which NCPAC and FCM do not wish to participate." *Appellees Brief* at 5 n. 7.

242 (1968) (Harlan, J., concurring); *Motor & Equip. Mfrs. Assn., Inc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980). In fact, even in dealing with the issues of statutory construction, it is the obligation of the courts, not an administrative agency, ultimately to determine the meaning of a statute. *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) ("[a]lthough an agency's interpretation of the statute under which it operates is entitled to some deference, this deference is constrained by our obligation to honor the clear meaning of a statute." *citation omitted*).[7]

III. 2 U.S.C. §437c(b)(1) of the Federal Election Campaign Act, Upon Which The FEC Relies For Its Exclusive Standing Claim, Does Not Grant Exclusive Standing Under The Fund Act.

Section 437c(b)(1) of FECA does not deal with standing under the Fund Act, but rather allocates enforcement authority among the various departments of the federal government. Standing is controlled by sections 9011(b) of the Fund Act and §437(c) and 437h(a) of FECA.

7. Moreover, section 9011(b) of the Fund Act does not provide for deference to the FEC even with respect to non-constitutional issues. On the contrary, the statute states unambiguously that exhaustion of administrative remedies is not required before resort to judicial review:

> "[t]he district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law."

26 U.S.C. §9011(b)(2).

This extraordinary characteristic of the statute is crucial. Although the FEC attempts to lump together all federal election laws, this non-exhaustion requirement makes the Fund Act radically different from the other federal election laws to which the FEC refers.

Section 9011(b)(1) grants the plaintiffs in these actions the clear right to institute an action for injunctive relief to implement any provision of the Fund Act. 2 U.S.C. §437c(b)(1) has no bearing whatsoever upon this express grant of authority to plaintiffs to bring injunctive actions to implement the Fund Act.

The Fund Act and FECA are separate statutes with different purposes and modes of operation. The Fund Act is the culmination of a long history of congressional concern that the integrity of the office of the Presidency required special protection.

As part of its special public funding and enforcement scheme the 1971 Fund Act, Congress established an express right of action for national political committees, among others, to sue for injunctive, declaratory, or other relief to "implement or construe" any portion of the Act, including section 9012(f). 26 U.S.C. §9011(b)(1). This right of action was granted in addition to the general power lodged in the Department of Justice to enforce provisions of the Act.

Later in 1971, Congress also enacted FECA, in a substantially different form than today's statute. Pub.L. No. 92-225, 86 Stat. 3 (1971). Under the 1971 FECA, the Comptroller General carried out administrative and investigatory duties, *id.* at §308(c)(d)(1), but only the Attorney General could institute a civil action for violations of the statute's provisions. *Id.*

In the 1974 amendments to FECA, Congress created the Federal Election Commission to replace the Comptroller General, Pub.L. No. 93-443, 88 Stat. 1263 (1974), at §310, but invested the FEC not only with administrative and investigatory duties, but with civil enforcement powers as well. To make clear that it intended to divest the Comptroller General and the Attorney General of most of the powers they had held under the 1971 Act, Congress stated that the "[FEC] has primary jurisdiction with respect to the civil enforcement" of the Act. *Id.* at §310(b).

The 1974 amendments left a vestige of enforcement power in the Attorney General, however. Section 314(a)(2) of those Amendments provided that upon receiving a complaint, the FEC would have two alternative courses of action: either to "(A) report such apparent violation to the Attorney General; or (B) make an investigation [on its own]." Section 314(a)(6) further provided that in certain circumstances the FEC could refer violations to "the appropriate law enforcement authorities."

In the 1976 amendments to FECA, Pub.L. No. 94-283 90 Stat. 475 (1976), Congress finally determined that all government civil enforcement of the Act would be centralized in the FEC. According to the House of Representatives Report on the new amendments, under the 1971 Act and 1974 amendments:

> enforcement responsibility was fragmented, and the line between improper conduct remediable in civil proceedings and conduct punishable as a crime blurred . . . . [Therefore] the Committee concluded that it was appropriate to simplify and rationalize the present enforcement system.

Democratic Party v. National Conservative Political Action Committee, 578 F.Supp. 797, 806 (E.D. Pa. 1983). Congress centralized authority in the FEC by transferring many of the criminal code provisions relating to federal election campaigns (under which other law enforcement authorities were prosecuting violations of FEC) from Title 18, U.S.C., to the 1971 Act. *See* S. REP. No. 94-677, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, 930.

Most importantly, for the *first time*, in keeping with this desire to consolidate governmental enforcement responsibilities, Congress used the word "exclusive" in section 437c(b)(1).[9]

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9. In 1980 the language of section 437c(b)(1) was changed to eliminate the word "primary." Pub.L. No. 96-187, 105(6), Title I, 93

The fact that §437c(b)(1) was meant only to consolidate government enforcement authority and not directed to questions of jurisdiction or standing is made clear not only by the history cited above. This fact is made even more evident when another provision of FECA, §437d(e), is examined. Section 437d(e) provides that "the power of the [FEC] to initiate civil actions under subsection (a)(6) of this section shall be the exclusive civil remedy for the enforcement of the provisions of this Act." (Emphasis added). "This Act" is defined in §431(19) as referring *only* to FECA, not the Fund Act. "Subsection (a)(6)" describes the scope of the Commission's enforcement power and specifically refers to the FEC's power to enforce Fund Act provisions as well. Yet the "exclusive civil remedy" section, §437d(e), which cross-references to (a)(6), makes no mention *at all* of the Fund Act.

Thus, Congress did provide its unambiguous terms for an exclusive enforcement mechanism — but it applies only to FECA, not to the Fund Act. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, the FEC has nonexclusive jurisdiction over Fund Act cases, and exclusive jurisdiction (with the exception of constitutional claims, §437h(a)), over FECA enforcement actions[9]. There is nothing irrational about this statutory scheme. Indeed, to adopt the FEC's "exclusivity" viewpoint would divest §9011(b) — with its specific grant to plaintiffs regardless of the status of their administrative remedies — of any meaning whatsoever. Clearly, the latter is the irrational result.[9]

NOTES (Continued)

Stat. 1354, 1366 (Jan. 8, 1980). There is no legislative history for this change. It appears to be merely a housekeeping amendment to eliminate what appears to be redundant language.

9. It should be noted that 9011(b) has remained undisturbed through the passage of FECA in 1971 and its amendment in 1974,

The simple fact is that Congress granted this Court the power to hear injunctive actions in §9011(b). However, as noted above, this Court has no need to decide whether section 437c(b)(1) and section 9011(b) are in conflict, since this action is not an enforcement action, and section 437c(b)(1), even on its face, does not apply.

1978 and 1980. Surely, if Congress had wished to amend or repeal the clear language of section 9011(b) it would have done so on one of those four occasions. Congress was very much aware of the existence and content of section 9011(b) when it amended FECA in 1974 to include private rights of action in constitutional cases under section 437h(a). In fashioning this private remedy, the Senate bill attempted to include the exact language of section 9011(b), to permit actions to "implement or construe any provision" of FECA. 1974 U.S. CODE CONG. & AD. NEWS, 5803-04. The House and Senate Conference Committee was unwilling to adopt the broad language of section 9011(b) in the FECA context. *Id.* at 5804. The Committee nevertheless specifically did not amend the Fund Act to repeal section 9011(b) or to narrow it, even though it recommended substantial amendments to the Fund Act in sections 404 to 408 of the very same bill. See, 1974 U.S. CODE CONG. & AD. NEWS, 5877-77.

CONCLUSION

For the reasons set forth above, this Court, while reversing the judgment of the United States District Court for the Eastern District of Pennsylvania that 26 U.S.C. §9012(f) violates the First Amendment, should affirm the judgment of the Court below that 26 U.S.C. §9011(b) does afford a private right of action to the DNC.

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